No. 83 -

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1983

ROBERT A. SULLIVAN, PETITIONER,

v.

LOUIE L. WAINWRIGHT, RESPONDENT.

PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

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QUESTIONS PRESENTED

1. Is a capital defendant denied effective assistance of counsel at the penalty phase of his capital trial when counsel failed to develop or present highly relevant mitigating evidence concerning the accused's character and background that counsel either knew or should have known was available and important?

2. Did the Eleventh Circuit err in upholding jury instructions that a reasonable juror might well have understood to preclude consideration of nonstatutory mitigating circumstances through:

(i) a disregard of Sandstrom v. Montana, 442 U.S. 510 (1979), thus creating a conflict with the Fifth Circuit's condemnation of similar jury instructions in Washington v. Watkins, 655 F.2d 1346 (5th Cir. 1981), cert. denied, 456 U.S. 949 (1982); and

(ii) a failure to recognize that instructional error under Lockett v. Ohio, 438 U.S. 586 (1978), infects a capital sentencing trial with prejudice sufficient to satisfy the requirements of Wainwright v. Sykes, 433 U.S. 72 (1977), and United States v. Frady, 456 U.S. 152 (1982)?

3. Was the "especially heinous, atrocious, and cruel" aggravating factor applied to petitioner's case in a way that failed genuinely to narrow the class of those eligible for the death penalty in violation of the eighth and fourteenth amendments?

4. Does a prosecutor's deliberate and calculated use of a stratagem to introduce inadmissible evidence suggest-

ing that the state's key witness had taken and passed a polygraph in an impermissible effort to bolster the credibility of the witness violate the sixth, eighth, and fourteenth amendments?

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Petitioner Robert A. Sullivan respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Eleventh Circuit denying his constitutional challenges to the sentence of death imposed upon him by the State of Florida.

OPINIONS BELOW

The report of the United States Magistrate recommending denial of the writ of habeas corpus, which was filed on March 19, 1981, appears as Appendix A. The unreported order of the United States District Court for the Southern District of Flordia, entered on June 4, 1981, appears as Appendix B. The district court's order dismissing petitioner's motion for a new trial, entered on July 10, 1981, appears as Appendix C.

The Eleventh Circuit affirmed the district court's dismissal of the writ on January 17, 1983. Sullivan v.

Wainwright, 695 F.2d 1306 (11th Cir. 1983). Its opinion appears as Appendix D. A timely motion for rehearing was denied on May 17, 1983. The order is noted at 706 F.2d 318 (11th Cir. 1983).

JURISDICTION

The opinion of the court of appeals affirming the denial of the petition for a writ of habeas corpus was entered on January 17, 1983. The Court of Appeals denied a timely motion for rehearing in an order dated May 17, 1983. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. Amendment VI to the Constitution of the United States provides in relevant part: "In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defense."

2. Amendment VIII to the Constitution of the United States provides: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."

3. Amendment XIV, Section 1 to the Constitution of the United States provides, in relevant part: "[N]or shall any State deprive any person of life, liberty, or property, without due process of law. . . ."

4. Florida Statutes, Section 921.141 (1982 Supp.), is set forth in Appendix E.

STATEMENT OF THE CASE

A. Course of Proceedings

Petitioner was convicted of first degree murder and robbery in the Circuit Court of Dade County in November 1973. He was sentenced to death under the Florida statute passed in the wake of Furman v. Georgia, 408 U.S. 238 (1972). His conviction and death sentence were affirmed, Sullivan v. State, 303 So. 2d 623 (Fla. 1975); he was one of the first to be affirmed under Florida's post-Furman statute. Certiorari was denied. Sullivan v. Florida, 428 U.S. 911 (1976).

Sullivan then filed a motion to reduce sentence in the Florida trial court pursuant to Rule 3.800(b) of the Florida Rules of Criminal Procedure. He noted the twenty-seven intervening decisions of the Florida Supreme Court in death cases which had created a body of law that established the excessiveness of the death penalty as applied to him. Specifically, he noted that the Florida Supreme Court had since held that the statutory aggravating circumstances of "committed during the course of robbery" and "committed for pecuniary gain" could not be double-counted based on the same facts of the underlying robbery. Provence v. State, 337 So. 2d 783 (Fla. 1976), cert. denied 431 U.S. 969 (1977). He also noted that subsequent Florida cases had closely limited the application of the "especially heinous, atrocious, and cruel" aggravating circumstance, Fla. Stat. Ann. § 921.141(5)(h), in a way that made it clear that it was not properly applied in his case. See, e.g., Cooper v. State, 336 So. 2d 1136, 1141 (Fla. 1976); Halliwell v. State, 323 So. 2d 557, 561 (Fla. 1975); Tedder v. State, 322 So. 2d 908, 910 (Fla. 1975).

Finally, he made a proffer of psychiatric testimony concerning his troubled childhood and adolescence and other testimony regarding his capacity for rehabilitation that would have established nonstatutory mitigating circumstances not previously considered by the sentencer.

The trial court denied the motion on January 24, 1977. In March 1979, Sullivan filed for post-conviction relief pursuant to Rule 3.850, Florida Rules of Criminal Procedure. On April 26, 1979, the trial court denied relief on all of the issues except the claim of ineffective assistance of counsel. A hearing was scheduled on that claim for May 1, 1979. The trial court also denied Sullivan's motion to be present and testify at that hearing; instead, it indicated that it would treat the allegations in Sullivan's motion as true. After a short hearing at which only one of Sullivan's trial attorneys testified, the court denied the motion.

While Sullivan's appeal was pending in the Florida Supreme Court, the Governor of Florida signed his death warrant. Petitioner moved the Florida Supreme Court for a stay of execution. The court heard oral argument on the motion for a stay and then issued an order denying the stay and denying Sullivan's appeal on the merits. Sullivan v. State, 372 So. 2d 938 (Fla. 1979). This ruling was issued before Sullivan had an opportunity to brief the issues on the merits and before the record on appeal was even prepared and submitted to the court. Compare Barefoot v. Estelle, ___ U.S. ___, 51 U.S.L.W. 5189, 5191, 5193 (July 6, 1983).

Sullivan then filed a petition for a writ of habeas corpus in the United States District Court for the Southern District of Florida on June 21, 1979. The district court entered a stay of petitioner's June 27 execution date and referred the matter to a magistrate for an evidentiary hearing on the claim of ineffective assistance of counsel and the failure of the state court to allow Sullivan to be present at its hearing on that issue. The hearing was held; the magistrate issued a lengthy opinion denying petitioner's claims. The district court confirmed that order on June 4, 1981.

On appeal, the Eleventh Circuit affirmed the denial of the writ. It rejected petitioner's claim of ineffective assistance of counsel at the sentencing phase. With regard to petitioner's substantive claims, it held that all but one were barred under Wainwright v. Sykes, 432 U.S. 72 (1977). The court construed the remaining claim as presenting an issue of state evidence law only and denied habeas on the ground that no federal constitutional claim was stated.

B. Facts Relevant to the Questions Presented

(1) Ineffective Assistance of Counsel at the Sentencing Phase:

At the penalty trial, Sullivan's counsel called several witnesses familiar with petitioner from college and from the jail to adduce testimony tending to show the existence of nonstatutory mitigating circumstances. He failed, however, to develop adequately or to introduce additional evidence or testimony regarding other, more critical non-

statutory mitigating factors. Some of this evidence was readily available to and known to petitioner's counsel.

The opinion of the magistrate, confirmed by the district court, rejected this claim. It found "that the petitioner's allegations of Mr. Dean's failure to present mitigating circumstances is without merit. This Court is thoroughly familiar with the entire record before it and suggests that . . . Mr. Dean's presentation of mitigating circumstances may have been limited because there was little in the way of mitigating circumstances to be offered." App. A at 45a.

A review of the record, however, flatly contradicts the magistrate's assertion. It is clear that there were significant nonstatutory mitigating circumstances to be presented to the jury and that at least some of them were known to petitioner's counsel. The motion to mitigate contains as exhibits two pretrial psychiatric evaluations. While neither found evidence of psychosis, both delineated relevant mitigating circumstances that a reasonably able counsel would have recognized as relevant to sentencing. The September 20, 1973 report by Dr. Reichenberg found "suggestions of underlying emotional disturbances of long standing involving role turmoil. . . ." These were reflected in some of the clinical tests:

> Sentence Completion items of significance included: I OFTEN drink quite heavily; I GET REALLY ANGRY WHEN I think of the rotten childhood I experienced; I CAN'T FORGET that my mother caused me to have as a child a very severe stammering problem; OTHER PEOPLE sometimes do not understand me, and I REGRET not having a true father-son relationship while growing up.

Report of Dr. Norman Reichenberg, September 20, 1973.

The other report was even more extensive and specific.

> Family history reveals that he was adopted when he was two weeks old. He does not know who his natural parents are. His father is a surgeon practicing in New Hampshire, although he has recently had a stroke. His mother lives in Massachusetts. His parents were divorced when he was six years old, and he was brought up by his mother. There are no siblings. His father remarried when the patient was 14 years old. His mother has suffered from nervous symptoms and has been in a mental hospital recently.
>
> * * *
>
> Family relationships have been a source of psychological stress. His mother has been a controlling, dominating and restrictive person, critical of him and his father, complaining and at times even physically attacking him. He has never had a "true father-son relationship." He saw relatively little of his father because of the divorce and his mother's antagonism to the father. This became especially bad after his father remarried. . . . He learned from his father and friends of his parents, that the reason for his adoption was an attempt on the part of his mother to save the marriage. Prior to the divorce his mother took little interest in him and he was trained mostly by a housekeeper. After the divorce, his mother became hostile and critical, threatening to tell lies about him to his father, and to reveal his adoption to his friends. He and his mother have had little to do with each other since 1967. He has been told by his father that his mother is the cause of his speech problem. She had refused to let him have proper speech training.
>
> * * *
>
> Some phobic symptoms are noted, such as a dislike of heights, blood and violence. He has always avoided fights and has not been an aggressive or violent person. This makes it difficult for him to understand his present situation. Generally he has been able to get along well with people, although he has been a sensitive and sometimes suspicious person. He tends to be shy and at times feels people do not like him.
>
> * * *

> Impression: I believe that he is suffering from a personality disorder, with homosexuality and anti-social patterns the dominant factors. It is clear from the background of his early life that he grew up in a home torn by dissention and dominated by an emotionally unstable mother. The development of homosexual activities fits in the recognized clinical picture of a controlling and dominating mother with an absent indifferent father. The additional stresses resulting from his speech problems helped to develop an individual with a great deal of inner turmoil and marked feelings of inadequacy and inferiority. Some of this he was able to compensate for in his later years by achieving a kind of acceptance in his college activities and his work accomplishment. Over the years there were accumulated anger and resentment directed towards his parents for their pressures of criticism, rejection and disapproval. The additional pressures of awkward social relationships with the need to hide his homosexual proclivities no doubt added to the increasing turmoil within him. His failures in his work after initial success and apparently related to the blackmail problem were additional pressures. It appears that the robbery and subsequent events were related to the hostile and angry feelings directed towards authority figures with a sudden and impulsive release of aggression and anger.

Report of Dr. William Corwin, October 1, 1973. None of this information was adduced at the sentencing hearing. Also not adduced was his favorable employment history and his good school record.

On appeal, the Eleventh Circuit affirmed. It rejected petitioner's claim of ineffective assistance of counsel at the penalty phase on two grounds. First, it held that "a consideration of the totality of the circumstances encompasses the quality of counsel's assistance from the time of appointment through appeal." 695 F.2d at 1309 (citing Goodwin v. Balkcom, 684 F.2d 794, 804 (11th Cir. 1982), cert. denied 103 S.Ct. 1798 (1983). However, it failed to note both

that petitioner did challenge counsel's effectiveness at all stages[1/] and the en banc Eleventh Circuit ruling in Washington v. Strickland, 693 F.2d 1243 (11th Cir. 1982), cert. granted, ___ U.S. ___, 51 U.S.L.W. 2865 (June 6, 1983), which focused on the standard of ineffectiveness of counsel at the penalty phase.

Second, the Court of Appeals only addressed that part of petitioner's ineffectiveness claim regarding counsel's failure to make even rudimentary, adequate argument at the penalty phase -- his argument consists of only two pages in the transcript -- and his failure to object to the prosecutor's argument regarding nonstatutory aggravating factors prohibited by Florida law. Sullivan, 695 F.2d at 1309. Although the court recited that it "carefully reviewed counsel's performance during the penalty phase, in light of the totality of the circumstances as they were known to counsel at that time," id , it failed to address whether counsel adequately developed relevant evidence in mitigation in light of the preexisting psychiatric reports. Id.

1/ Petitioner's trial, and especially the penalty phase, were characterized by counsel's failure to develop evidence and make proper objections. This was particularly true of the issues relevant to the death penalty; counsel did not even know to object to the exclusion of jurors not properly excludable under Witherspoon v. Illinois, 391 U.S. 510 (1968), decided five years before trial. See Sullivan, 695 F.2d at 1310. He failed to object to the improper instructions to the jury, see Point II, infra; to the prosecutor's argument regarding and the judge's sentencing opinion relying on non-statutory aggravating circumstances, which is prohibited by state law, see Songer v. State, 365 So. 2d 696 (Fla. 1978); or to raise any of these issues on appeal in the state courts. See Sullivan, 695 F.2d at 1309.

(2) The Limitation of the Jury's Ability to Consider Non-statutory Mitigating Factors:

Petitioner's counsel put on some (although neither the best nor the most relevant) evidence of nonstatutory mitigating circumstances. The instructions to the Jury, however, could have led a reasonable juror to conclude that he or she was precluded from considering that evidence. This was reinforced by the prosecutor's closing argument, which specifically argued the point.

The trial judge first charged the jury that it was limited to consideration of the statutory aggravating circumstances:

> The aggravating circumstances which you must consider are limited to such of the following as may be established by the evidence.

R. 1626.* He then instructed the jury as follows:

> During the hearing you will receive evidence and testimony concerning certain aggravating and mitigating circumstances and all other matters that the Court deems relative [sic] to sentencing.
>
> Following the presentation of the testimony, the attorneys will be permitted to address arguments to you on the penalty aspect of this case.
>
> * * *
>
> Should you find one or more of these aggravating circumstances to exist, it would then be your duty to determine whether or not sufficient mitigating circumstances exist to outweigh the aggravating circumstances found to exist.
>
> The mitigating circumstances which you must consider if established by the defendant are these.
>
> One, that the defendant had no significant history of prior criminal activity.

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* Citations to the state court record are designated as R. ____.

> Two, that the crime for which the defendant is to be sentenced was committed while the defendant was under the influence of extreme mental or emotional disturbance. That the victim was a participant in the defendant's conduct or consenting to the act. That the defendant was an accomplice in an offense for which he is to be sentenced but the offense was committed by another person and the defendant's participation was relatively minor.
>
> That the defendant acted under extreme duress or under the substantial domination of another person. The capacity of the defendant to appreciate the criminal activity of his conduct or to conform his conduct to the requirements of the laws was substantially impaired. The age of the defendant at the time of the crime.
>
> * * *
>
> If one or more aggravating circumstances are established, you should consider all the evidence tending to establish one or more mitigating circumstances and give that evidence such weight as you feel it should receive in reaching your conclusion as to the sentence which should be imposed.

R. 1625, 1627-1629. Thus, the jury was told that it was limited to consideration of statutory aggravating circumstances, which were then listed; that, should the jury find "one or more of these aggravating circumstances," it should then consider mitigating circumstances; that the mitigating circumstances "are these," listing only the statutory mitigating circumstances; and that in weighing the aggravating and mitigating circumstances, it "should consider all the evidence tending to establish one or more mitigating circumstances." Id. (emphasis added).

The prosecutor's argument at the sentencing phase was quite explicit in telling the jury his understanding of the instructions: that the law only allowed it to consider the mitigating circumstances listed in the statute.

(Mr. Dubitsky): Now you have heard the judge's instructions as to what the mitigation factors are. And you heard me question each of the witnesses to whether they knew whether any mitigating factors were present. Each of them indicated they had no idea if any of the mitigating conditions required by the law were present. But Mr. Dean would have you believe that . . . because he has done those things in his life that you should find that there are mitigating circumstances . . .

I submit to you that is not what the law contemplates. There hasn't been any testimony and there hasn't been any evidence that the felony was committed while the defendant was under the influence of any extreme mental or emotional disturbance. There hasn't been any evidence that the victim was a participant in defendant's conduct or consented. There hasn't been any evidence that the defendant was an accomplice to a capital felony which was committed by another person. . . .

R. 1672-73 (emphasis added).[2/]

In federal habeas, the state argued that consideration of this claim was barred under Wainwright v. Sykes. The magistrate did not consider whether petitioner had shown cause and prejudice because she viewed the issue in conjunction with petitioner's claim of ineffective assistance of counsel. App. A at 99a. She found that the instructions did not prejudice the petitioner because the jury was instructed to consider "all matters" that the court deemed "relative [sic] to sentencing." R. 1625.

2/ Petitioner's counsel's argument did not help any:

> Certain mitigating circumstances have been gone over with you by Mr. Dubitsky, which, in the instructions that you take to the jury room, you can go over closer. And, those mitigating circumstances together with the testimony and the evidence which you heard here today, hopefully, will assist you in reaching the decision in this case which we are asking for.

R. 1679.

On appeal, the Eleventh Circuit noted that "cause" might exist because of "the relative novelty of Sullivan's claims in 1973. . . ." 695 F.2d at 1311 (discussing Engle v. Issac, 456 U.S. 107, 131 (1982)). Nevertheless, it declined to reach the merits of the claim because it determined that Sullivan failed to show actual prejudice under United States v. Frady, 456 U.S. 152, 167-68 (1982). Sullivan, 695 F.2d at 1311. Despite the fact that the record is clear that Sullivan presented some nonstatutory evidence, the court of appeals inexplicably held that "Sullivan has not shown that the jury was denied the use of any nonstatutory mitigating factors. . . ." Id.

(3) The Improper Application of the "Especially Heinous, Atrocious and Cruel" Aggravating Circumstances:

The trial judge's written findings demonstrate that he improperly relied on one nonstatutory aggravating circumstance, lack of remorse, and employed an unconstitutionally broad interpretation of a second, that the crime was "especially heinous, atrocisous [sic] and cruel." Although the trial judge found two statutory mitigating factors, petitioner's age and lack of a criminal record, he determined to impose the death sentence. The full text of the judge's findings is as follows:

> This Court independent of, but in agreement with, the advisory sentence rendered by the jury does hereby impose the death penalty upon the defendant, ROBERT AUSTIN SULLIVAN, and in support thereof as required by 921.141(3), submits this, its written findings upon which the sentence of death is based.
>
> These findings are as follows:

1. That sufficient aggravating circumstances exist in this particular case that far outweigh any mititating circumstances in the Record. The death of this decedent occurred while the defendant was engaged in the commission of the crime of armed robbery. In addition thereto, the capital felony was committed for pecuniary gain, as the decedent had been robbed of his personal possessions as well as the possessions of the company he represented. These facts alone in this Court's judgement could justify the imposition of the death penalty, but this particular killing is far more useless and heinious [sic] than these.

2 agg circ.

2. The Court finds that the capital felony committed in this case was especially heinious, [sic] atrocious and cruel. The Supreme Court of Florida in consideration of the legalities of the recently enacted death sentence in the State of Florida decreed that these terms were to receive their common connotations and decreed that "heinious" [sic] meant "extremely wicked or shockingly evil," "atrocious" meant "outrageously wicked and vile" and "cruel" meant "a design to inflict a high degree of pain with utter indifference to or even enjoyment of the suffering of others." See State vs. Dixon, 283 So. 2d 1, pg. 9, Florida Supreme Court, 1973. This Court cannot conceive of the commission of a crime that is more vividly described by these words as set forth by the Supreme Court than the one at bar. The defendant in this case saw fit to braddadociously state that he wanted to commit a "crime" which in his mind was to be "the perfect crime". The decedent was bound with hands behind his body with adhesive tape, mentally toyed with by the defendant as to operating and management techniques of the establishment where he worked, a place where the defendant himself had previously been employed. After this mental exercise, the decedent was led to a lonely spot in Dade County with hands still behind him and as he stumbled in the darkness, struck from behind with a tire iron, and then again from behind, while on the ground in a total [sic] helpless position, was mortally wounded with four blasts from a .12 gauge shotgun to the back of the head. This Court cannot conceive of a more conscienceless crime.

3rd

3. This Court has observed the demeanor and the action of the defendant throughout this entire trial and has not observed one scintilla of remorseness [sic] displayed, indicating fullwell [sic] to this Court that the death penalty is the proper selection of the punishment to be imposed in this particular case.

This Court is not unmindful of the fact that the defendant is but 26 years of age and is further not unmindful of the fact that this is the defendant's

first conviction. However, the aggravating circumstances in this case purely outweigh beyond and to the exclusion of every reasonable doubt in the Court's mind the mitigating circumstances. This Court does impose the death penalty upon the defendant ROBERT AUSTIN SULLIVAN.

R. 1694-97, reprinted at App. F.

Nothing in the record supports the finding that the crime was "especially heinous, atrocious, and cruel." There was no evidence, and the trial judge did not find, that the victim was physically tortured. The trial judge's finding that the decedent was "mentally toyed with by the defendant [shortly before the murder] as to operating and management techniques of the establishment where he worked; a place where the defendant himself had previously been employed," R. 1817, is contradicted by the only relevant evidence in the record. The primary account of what transpired was provided by the accomplice, Reid McLaughlin, the state's main witness.[3/] He testified that:

> He was looking kind of worried, and I said, "Don't worry about it, and we will leave you in the woods and tie you up." . . . . and then Sullivan said "We will tie you up, and take your clothes off so that you will not want to hitch-hike, that would give us more time to get away."
>
> Then he [defendant] started to go over with this guy that is with his business plans, and the annual rate, and the wages, and the other stuff at Howard Johnsons.
>
> Q. Who was going over this?
>
> A. Mr. Sullivan was talking to Mr. Schmidt about it, and he was telling Mr. Schmidt about all these prices and everything.

3/ The evidence also included petitioner's confession. But, as noted by the Florida Supreme Court: "This statement differed in no significant way from the testimony of the defendant's accomplice, McLaughlin, at Trial." Sullivan v. State, 303 So. 2d at 637.

> Then Mr. Schmidt began to wonder and he was wondering how Mr. Sullivan knew all about this, because it is only something that the Manager or the Assistant Manager would know.
>
> Q. Was there any other conversation other than what you have related?
>
> A. No.

R. 1376. The record thus does not support an inference that defendant and McLaughlin were trying to inflict mental torment upon Schmidt before they killed him, but rather that they were attempting to reassure him, albeit falsely.

On appeal, the judgment of the Florida Supreme Court was rendered in two separate opinions. Concurring specially but writing for a majority of the court, Justice Overton undertook to comply with the Florida Supreme Court's "separate responsibility in cases where a death sentence is imposed to determine independently whether the ultimate penalty is warranted." Sullivan v. State, 303 F.2d at 637. In canvassing "the aggravating and mitigating circumstances in this case . . . ," he recited the facts of the case. He noted neither torture nor that the victim was "mentally toyed with," only that petitioner falsely "told the manager that he would be released . . . without clothing." Id. After canvassing the mitigating factors in the record, he concluded that: "This was an execution-type slaying. The sentence of death is appropriate and should be affirmed." Id. at 638.

In both the district court and the court of appeals, petitioner argued that, in affirming the death sentence based, in part, on the "especially heinous, atrocious, and cruel" aggravating factor, the Florida Supreme Court erred in light of both Godfrey v. Georgia, 446 U.S. 420 (1980), and the sub-

sequent Florida case law. He specifically noted that the later Florida cases had held that the execution-like nature of a murder does not render it "especially heinous, atrocious, and cruel" absent some other, "additional acts as to set the crime apart from the norm." Cooper v. State, 336 So. 2d at 1141. Neither court dealt with this claim on the merits.

(4) The Prosecutor's Deliberate Interjection of the Fact that the State's Key Witness had taken a Polygraph Test in Violation of State Law:

The state's chief witness was Reid McLaughlin. He had originally been charged as a co-defendant but was allowed to plead no contest to second degree murder. He testified that he participated in the crime and observed Sullivan commit the murder. On cross-examination by defense counsel, the following exchange occurred:

Q. Did anyone tell you that your sentence would depend on how your testimony turned out?

A. Yes.

R. 1390. This was followed up on redirect as follows:

Q. Now, sir, when you say that your sentence is going to be determined by your testimony is there any question in your mind what your sentence is going to be?

A. No.

Q. Has there been an agreement as to what your sentence is going to be?

A. Yes.

Q. What is that?

A. Life.

* * *

Q. Now, Reid, I believe you just indicated that the sentence is going to be life?

A. Yes it is.

Q. Was there any agreement if you testified in a particular way that you would get anything other than life?

A. No.

Q. When you said that your sentence is going to be determined by your testimony and would you explain to the jury what you meant?

A. That I would have to take a polygraph test and pass it.

R. 1392, 1393-94.

The defense immediately moved for a mistrial. The court denied the motion on the ground that the question was not calculated to evoke the answer that the witness gave. The next day, however, the prosecutor admitted that the question was indeed "intended to elicit that answer." Nevertheless, the court denied a renewed motion for a mistrial. R. 1420-1434.

Based on clear Florida law that both the results of a polygraph or any references to one are inadmissible, a unanimous Florida Supreme Court condemned the actions of the prosecutor. 303 So. 2d at 635, 636. Nevertheless, it found that it was harmless error because of the overwhelming evidence of Sullivan's guilt, Id. at 636, 637.[4/] Two

4/ Justice Overton's concurring opinion, which commanded a majority of the court, went no further on this issue. 303 So. 2d at 637. The opinion by Justice Dekle, concurred in by three others, also noted that counsel declined a limiting instruction. Id. at 635. However, it is clear that there was no waiver because counsel twice moved for a mistrial. No doubt counsel declined the instruction out of fear that it might only serve to draw the jury's attention to it even more.

Justice Dekle's opinion also attempted to dissect the language of the redirect and concluded that: "We cannot know how the jury construed his answer, or what weight was given to it. . . ." 303 So. 2d at 635. On that basis, it affirmed.

justices concurred with regard to the conviction. They, however, would have reversed the sentence of death because of the state's deliberate error. 303 So. 2d at 636 (Boyd & Ervin, JJ., concurring).

The significance of the attempt to impermissibly bolster the credibility of McLaughlin with regard to the sentencing question is borne out in the record. The state put on no additional evidence at the penalty phase; it incorporated the testimony adduced at the guilt/innocence phase. McLaughlin testified that Sullivan had told him that he wanted to commit the perfect crime. R. 1360. He also testified that, after the crime, Sullivan said: "I don't feel no different." R. 1379. The prosecutor's closing argument at the sentencing phase urged the jury to impose the death sentence because Sullivan felt no remorse. R. 1374. The judge relied on the no remorse factor in imposing the death sentence. R. 1696-1697. And on appeal, the Florida Supreme Court cited the McLaughlin testimony in canvassing the aggravating and mitigating circumstances and upholding the death sentence. 303 So. 2d at 638.

In federal habeas, the magistrate rejected this claim on much the same basis as the Florida Supreme Court. App. A at 79a-82a. She did not discuss separately the effect of this error on the death sentence. The Eleventh Circuit affirmed on the ground that the claim "does not raise an issue of constitutional or federal law, and we do not have jurisdiction to consider it." 695 F.2d at 1313.

REASONS FOR GRANTING THE WRIT

I. THE COURT SHOULD GRANT THE WRIT TO DETERMINE WHETHER PETITIONER WAS DENIED THE EFFECTIVE ASSISTANCE OF COUNSEL AT THE SENTENCING PHASE OF HIS CAPITAL TRIAL WHEN COUNSEL FAILED TO DEVELOP OR PRESENT HIGHLY RELEVANT MITIGATING EVIDENCE CONCERNING THE ACCUSED'S CHARACTER AND BACKGROUND THAT COUNSEL EITHER KNEW OR SHOULD HAVE KNOWN WAS AVAILABLE AND IMPORTANT

As the Court has repeatedly affirmed with regard to capital sentencing: "What is important . . . is an individualized determination on the basis of the character of the individual and the circumstances of the crime." Zant v. Stephens, ___ U.S. ___, 51 U.S.L.W. 4891, 4895 (June 22, 1983) (emphasis in original); Barclay v. Florida, ____ U.S. ___, 51 U.S.L.W. 5206, 5211 (July 6, 1983) (plurality opinion). Petitioner's counsel, Mr. Dean, either knew or should have known that critical mitigating evidence concerning Sullivan's character and family background was available. Yet, amongst his many failings, he inexplicably failed to develop or present this evidence. The Court should grant the writ to determine whether petitioner was denied the effective assistance of counsel.

Sullivan's background consisted of a broken home; feuding, divorced parents who used him as a pawn in their emotional struggles; an emotionally unstable mother who was, by turns, domineering, neglectful, hostile, and physically abusive; and a distant and indifferent father. This helped him to develop as "an individual with a great deal of inner turmoil and marked feelings of inadequacy and inferiority . . . ," and to "accumulate anger and resentment directed towards his parents and for their pressure of criticism, rejection and disapproval." Report from Dr. William Corwin,

quoted supra at 7-8. Thus, the evidence that counsel failed to develop and present is much like that which this Court had no doubt was relevant in Eddings v. Oklahoma, 455 U.S. 104, 115 (1982). "Evidence of a difficult family history and of emotional disturbance is typically introduced by defendants in mitigation." Id. Yet, Sullivan's counsel failed to introduce such testimony.

Moreover, counsel either knew or should have known both that this evidence existed and was available and that it was relevant in mitigation. The reports of Drs. Reichenberg and Corwin were contained in letters addressed to Dean's predecessor counsel, Mr. Windsor. They would have been in the case file, and Mr. Dean should have been aware of them. If he was not, then he failed to make even the most minimal investigation of the case file -- quintessential ineffective assistance of counsel. See Washington v. Strickland, 693 F.2d at 1252. And, a simple reading of the reports would have highlighted the otherwise obvious relevance of this information. Dr. Corwin's report concluded that: "It appears that the robbery and subsequent events were related to the hostile and angry feelings directed towards authority figures with a sudden and impulsive release of aggression and anger." Id.

It is also plain that counsel's failure to adduce this evidence helped procure Sullivan's death sentence. In conducting its independent weighing of the aggravating and mitigating circumstances, the Florida Supreme Court specifically noted that: "There was no indication of deprivation in his background." 303 So. 2d at 638. In light of the two statutory mitigating circumstances found by the trial

judge -- the lack of a prior criminal record and Sullivan's age, this additional mitigating evidence might well have made the critical difference with the jury, the judge, or the Florida Supreme Court.

The Court has granted certiorari in two cases presenting the question of the standards to be applied in determining effective assistance of counsel both at an ordinary criminal trial, United States v. Cronic, No. 82-660, cert. granted, ___ U.S. ___, 51 U.S.L.W. 3611 (Feb. 22, 1983), and at the sentencing phase of a capital case. Strickland v. Washington, No. 82-1554, cert. granted, ___ U.S. ___, 51 U.S.L.W. 2865 (June 6, 1983). The Court should grant the writ and determine whether petitioner was denied the effective assistance of counsel in light of the standards to be set in Cronic and Strickland v. Washington.

II. THE WRIT SHOULD BE GRANTED TO DECIDE A CONFLICT BETWEEN THE CIRCUITS REGARDING THE PROPER CONSTITUTIONAL ANALYSIS OF CAPITAL SENTENCING INSTRUCTIONS THAT A REASONABLE JUROR COULD UNDERSTAND TO PRECLUDE CONSIDERATION OF NON-STATUTORY MITIGATING CIRCUMSTANCES AND TO DETERMINE THE PROPER APPLICATION OF PROCEDURAL DEFAULT PRINCIPLES TO THIS INSTRUCTIONAL ERROR

In Lockett v. Ohio, 438 U.S. 586 (1978) and Eddings v. Oklahoma, 455 U.S. 104 (1982), the Court held that the sentencer must be allowed to consider all mitigating factors before imposing a death sentence. Florida law in effect at the time of petitioner's trial -- and adhered to by the jury and judge that sentenced him -- violated this basic principle.

In sentencing petitioner under the then-new Florida statute, the trial judge limited the jurors to only the statutory mitigating factors. He first told them that they could

consider only the statutory aggravating circumstances. He then told them that if they could find "one or more of these aggravating circumstances," they should consider the mitigating circumstances "which . . . are these," listing the statutory mitigating circumstances only. Finally, he charged them to consider only the evidence "tending to establish one or more mitigating circumstances." R. 1627-29. Given these instructions, a reasonable juror could have understood that he or she was limited to considering only that evidence in mitigation that pertained to one of the mitigating circumstances that the judge had listed -- i.e., the statutory circumstances only.[5/] Since a reasonable juror could have understood the instructions in the constitutionally impermissible way, the petitioner's constitutional rights were violated. Sandstrom v. Montana, 442 U.S. 510, 514 (1979); Washington v. Watkins, 655 F.2d 1346, 1370 (5th Cir.), reh'g denied, 662 F.2d 1116 (5th Cir. 1981), cert. denied, 456 U.S. 949 (1982).

The Eleventh Circuit affirmed the denial of the writ on this issue because there had been a procedural default in the state courts and because it found no prejudice under Wainwright v. Sykes. [6/] It reached the latter conclusion because it could not "say that the jury instructions so

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5/ As noted above, the prosecutor explicitly emphasized that impression. He argued that the jury should not consider the nonstatutory mitigating factors proffered by the defendant because "that is not what the law contemplates." R. 1674.

6/ The court below suggested that there was "cause" because counsel could not have been expected to anticipate the constitutional developments not to come for another five years until Lockett was decided. 695 F.2d at 1311.

infected the sentencing phase of the trial that the actual prejudice test [of United States v. Frady] is met." 695 F.2d at 1311. Thus, although the Sullivan panel did not cite it, the ruling in this case is substantially the same as that in Ford v. Strickland, 696 F.2d 804, 813-14 (11th Cir. 1983) (en banc), decided ten days before Sullivan.

Petitioner will not recapitulate all the reasons supporting the grant of the writ on this issue, but respectfully asks the Court to consider the reasons set out in the petition for a writ of certiorari in Ford v. Strickland, No. 82-6923, as if fully set out here. Suffice it to note that, since consideration of all mitigating factors is "constitutionally indispensible," Woodson v. North Carolina, 428 U.S. 280, 304 (1976), instructions that would have led a reasonable jury to consider itself limited to only the statutory factors "so infected the sentencing proceedings as to drain them of fundamental fairness." Washington, 655 F.2d at 1376. This is particularly true in light of the discretionary nature of the sentencing decision, as the Court has recently explained. "It is entirely fitting for the moral, factual, and legal judgment of judges and juries to play a meaningful role in sentencing." Barclay, 51 U.S.L.W. at 5209. But it cannot if the jurors are limited in the mitigating facts they may consider. If the jurors cannot consider -- or think that they cannot consider -- nonstatutory mitigating evidence, then they cannot "exercise their discretion in their own way and to the best of their ability." Id. Nor are they "free to consider a myriad of factors to determine whether or not death is the appropriate punishment." Ramos

v. California, ___ U.S. ___, 51 U.S.L.W. 5220, 5225 (July 6, 1983).

The court below held that Sullivan was not prejudiced because he "has not shown that the jury was denied the use of any nonstatutory mitigating factors. ... . " 695 F.2d at 1311. But as indicated above, the majority of Sullivan's evidence at the sentencing phase went to nonstatutory mitigating considerations. Thus, if the jury thought that it was limited to the statutory factors, as the instructions tended to indicate, he was substantially prejudiced.

While subsequent Florida cases have held that the statute should not be construed to prescribe an exclusive list of mitigating circumstances, see Songer v. State, 356 So. 2d 696, 700 (1978), petitioner's jury was never told that. Whatever the validity of Songer,[7/] it came too late

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7/ In 1979, the Florida legislature amended Section 921.141 in an effort to comply with Lockett. The words "as hereinenumerated" were omitted from subsections (2)(b) and (3)(b) to enable the jury and judge in capital cases to weigh mitigating circumstances other than those specified by statute. The relevant legislative materials explained:

> Senate Bill 523 amends s. 921.141(1), Florida Statutes, to bring it in line with the U.S. Supreme Court's reasoning in Lockett, thereby allowing all evidence relevant to the nature of the crime and the character of the defendant to be put before the jury for the purpose of aiding the jury in its deliberations over an appropriate advisory sentence. To this end, Senate Bill 523 eliminates the restriction in subsections (2)(b) and (3)(b) relative to enumerated mitigating circumstances, allowing both the jury and the court to consider the presence of mitigating factors other than those listed in subsection (6).

Senate Staff Analysis and Economic Impact Statement (Florida), May 9, 1979 (revised), at 2.

(Continued)

for this petitioner. In this case the judge and jury observed all too well the limitations of the Florida statute in considering only the statutory mitigating circumstances. The judge read the jury the list of the statutory factors; a reasonable juror would have inferred that any mitigating circumstances must be drawn from that list. See Washington, 655 F.2d at 1370. When he issued the sentence, the trial judge noted only those mitigating factors that conformed to the statutory list: petitioner's age and the fact that this

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(Continued)

This alteration would have been unnecessary if, as the Songer court stated in 1978, the Florida law had complied with Lockett all along. In fact, an investigation of the legislative history reveals that the state legislature never intended to draw a distinction between the treatment of aggravating and mitigating circumstances. The omission of the words "limited to" in subsection (6) was the result not of a deliberate legislative decision to create a distinction between aggravating and mitigating circumstances, but rather of an error in transcription during the legislature's consideration of various bills designed to remedy the constitutional deficiencies identified in Furman. See Hertz & Weisberg, In Mitigation of the Penalty of Death: Lockett v. Ohio and the Capital Defendant's Right to Consideration of Mitigating Circumstances, 69 Calif. L. Rev. 317, 358 & n.199 (1981). See also Journal of the Florida House of Representatives, Special Session 1972, November 29, 1972, at 18, 19; November 30, 1972, at 41-42; December 1, 1972, at 48-52; Journal of the Florida Senate, Special Session 1972, November 30, 1972, at 25; December 1, 1972, at 37, 39-40.

The Songer court's contention that all of its earlier relevant decisions were in accord with its interpretation is not persuasive. See e.g. Cooper v. State, 336 So. 2d 1133 (Fla. 1976), cert. denied, 431 U.S. 925 (1977), in which the court characterized subsection (6) as a "mandatory limitation" on the mitigating circumstances that could properly be considered by the sentencing authorities in a capital case. The court in Cooper stated that the "Legislature chose to list the mitigating circumstances which it judged to be reliable for determining the appropriateness of a death sentence * * *, and we are not free to expand the list." Id. at 1139 & n.7.

was his first offense. The judge's and jury's decisions were reached in accordance with the procedure set by Florida law at the time. But the Florida procedure did not accord with the federal Constitution. The Court should grant the writ to determine whether a federal court can reach this constitutional error on the merits.

III. THE COURT SHOULD GRANT CERTIORARI TO DETERMINE WHETHER THE APPLICATION OF THE "ESPECIALLY HEINOUS, ATROCIOUS, AND CRUEL" AGGRAVATING FACTOR TO PETITIONER'S CASE IN A WAY THAT FAILS GENUINELY TO NARROW THE CLASS OF THOSE ELIGIBLE FOR THE DEATH PENALTY VIOLATES THE EIGHTH AND FOURTEENTH AMENDMENTS

The trial judge who imposed petitioner's death sentence found four aggravating and two mitigating circumstances. He found that the murder was committed during the course of a robbery; that it was committed for pecuniary gain; that it was "especially heinous, atrocious, and cruel;" and that the petitioner displayed no remorse. He weighed these against the two statutory mitigating factors -- petitioner's age and the fact that it was his first conviction -- and imposed the death penalty. R. 1697.

Petitioner has consistently pointed out, both in state post-conviction proceedings and in federal habeas, that three of the four aggravating circumstances were improperly applied. Florida law prohibits consideration of non-statutory aggravating factors such as lack of remorse. Purdy v. State, 343 So.2d 4, 6 (Fla. 1977); Provence v. State, 337 So.2d 783, 786 (Fla. 1976); see Barclay, 51 U.S.L.W. at 5213 (Stevens, J., concurring). It prohibits the double counting of the same aspect of the crime, the underlying robbery, as

two separate aggravating factors: committed during the course of a robbery and committed for pecuniary gain. Provence, 337 So.2d at 786. And, as shown below, the "especially heinous, atrocious, and cruel" aggravating factor was improperly applied to this case in a vague and overbroad manner in violation of the Constitution.

In Zant v. Stephens, the Court explained the constitutional infirmity of the "especially heinous, atrocious, and cruel" aggravating circumstance:

> To avoid this constitutional flaw, an aggravating circumstance must genuinely narrow the class of persons eligible for the death penalty and must reasonably justify the imposition of a more severe sentence on the defendant compared to others found guilty of murder.
>
> Thus in Godfrey v. Georgia, 446 U.S. 420 (1980), the Court struck down an aggravating circumstance that failed to narrow the class of persons eligible for the death penalty. Justice Stewart's opinion for the plurality concluded that the aggravating circumstance described in subsection (b)(7) of the Georgia statute, as construed by the Georgia Supreme Court, failed to create any "inherent restraint on the arbitrary and capricious infliction of the death sentence," because a person of ordinary sensibility could find that almost every murder fit the stated criteria. Id., at 428-429. Moreover, the facts of the case itself did not distinguish the murder from any other murder. The plurality concluded that there was "no principled way to distinguish this case, in which the death penalty was imposed, from the many in which it was not." Id., at 433.

Zant v. Stephens, 51 U.S.L.W. at 5213 (footnotes omitted). Thus, to survive constitutional scruntiny, the "especially heinous, atrocious, and cruel" aggravating circumstance must be defined by a specifically delimiting state court construction so that its application "genuinely narrow[s] the class of persons eligible for the death penalty." Id.

While Florida has attempted to provide a constitutionally-adequate construction of this aggravating factor, it was not applied in this case. In State v. Dixon, 283 So. 2d 1 (Fla. 1973), the Florida Supreme Court limited this aggravating circumstance to those situations when "the actual commission of the capital felony was . . . [a] conscienceless or pitiless crime which is unnecessarily torturous to the victim." Id., at 9. This construction would comply with Godfrey. See 446 U.S. at 431. As in Godfrey, however, the jury was never told of this limiting construction. R. 1627; Godfrey, 446 U.S. at 429. Moreover, the facts of this case do not fit into the Dixon construction. There was no torture of the victim: He was struck down and then shot to death. This murder was not made heinous simply because the shooting was with a shotgun; Godfrey establishes that "it is constitutionally irrelevant that the petitioner used a shotgun instead of a rifle as the murder weapon. . . ." 446 U.S. at 333 n.16.

Although the sentencing judge did advert to the Dixon construction, R. 1696, he only referred to that portion that is substantially like the statutory terms that were held inadequate in Godfrey; compare R. 1696 with 446 U.S. at 428-29, language that a "person of ordinary sensibility could" use to "fairly characterize almost every murder. . . ." Id. Nor was this cured in his findings. In applying this aggravating circumstance, the judge relied upon four findings. He noted the premeditated nature of the crime, relying upon McLaughlin's testimony that petitioner desired to commit "the perfect crime"; the conscienceless nature of

the crime; the execution-like nature of the slaying, noting that the victim was bound and was shot while helpless on the ground; and the unsubstantiated finding that petitioner "mentally toyed" with the victim first. He made no findings of torture or the infliction of an unusual or disproportionate degree of pain.

More important, however, is the treatment of this case by the Florida Supreme Court in affirming the death sentence. It canvassed the aggravating and mitigating factors, and independently determined that death was warranted. It found no torture. It did not affirm the trial court's unsupported finding that petitioner "mentally toyed" with the victim. It did find that the murder was premeditated and that it "was an execution-type slaying." Sullivan, 303 So. 2d at 637-38. On that basis, it affirmed the death penalty.

Thus, the imposition of this death sentence was based upon the premeditated and execution-like nature of the crime. The consideration of these factors failed to "genuinely narrow the class of those eligible for the death penalty." As the Florida Supreme Court has itself observed, "there is nothing to set this execution murder 'apart from the norm of capital felonies.'" Mendez v. State, 368 So. 2d 1278, 1282 (Fla. 1979) (robbery victim shot twice while arms raised in submission).

> While we agree with the State that this execution-type murder may have been unnecessary, we agree with Cooper that the standard of an aggravating circumstance is whether the horror of the murder is "accompanied by such additional acts as to set the crime apart from the norm . . . the conscience list [sic] or pitiless crime which is unnecessarily torturous to the victim."

Cooper, 336 So.2d at 114. See also, Riley v. State, 366 So. 2d 19, 21 (Fla. 1978). But compare, Harvard v. State, 414 So. 2d 1032 (Fla. 1982) (defendant stalked and harassed ex-wife before "cold-blooded execution"); Vaught v. State, 410 So. 2d 148 (Fla. 1982) (defendant shot robbery victim who exposed his face; held "inflicted in a cold, calculating, or 'execution-style' fashion"); Johnson v. State, 393 So. 2d 1069 (Fla. 1980) ("execution murder"; defendant shot victim when latter ran out of bullets).

The unconstitutional application of the "especially heinous, atrocious, and cruel" factor to petitioner's case plainly resulted in prejudice. The trial court also found two statutory mitigating factors: Petitioner's age and the fact that this was his first conviction. Under Elledge v. State, 346 So. 2d 998, 1002-04 (Fla. 1977), the consideration of any improper aggravating circumstance requires reversal and resentencing when there are statutory mitigating circumstances present. See Barclay, 51 U.S.L.W. at 5210 (plurality opinion) and 5123 n.12 (Stevens, J. concurring). "As long as mitigating circumstances ha[ve] been found, it [is] impossible to know whether the result of the statutorily-required weighing process would have been different in the absence of the impermissible . . . aggravating factor." Id. at 5213 n.12. This is more than a mere state law violation. Barclay, 51 U.S.L.W. at 5211. Petitioner's death rests on an unconstitutioal application of an aggravating circumstance that, under state law, would have made a difference on appeal. Thus, there was actual prejudice.

The court below failed to address this issue in an adequate fashion. Rather, it focussed only on the consideration of the nonstatutory factor of lack of remorse, and did not consider the improper application of the other aggravating circumstances. 695 F.2d at 1312. In considering that question, it failed to find cause and prejudice. It based that conclusion on the trial judge's statement that the robbery/murder and committed for pecuniary gain circumstances "alone in the court's judgment could justify the imposition of the death penalty." Id. It also opined that the no remorse factor was not considered as an aggravating circumstance in imposing the death sentence. Id. at n.10.

The court of appeals thus erred in at least three ways. First, it failed to consider the unconstitutional application of the "especially heinous, atrocious, and cruel" factor, which was relied upon as an aggravating circumstance. Second, it failed to consider whether the trial judge's statement, that the robbery/murder and committed for pecuniary gain aggravating circumstances were enough to justify the death penalty, was anything more than a statement of the threshold determination that petitioner was within the class of those eligible for the death penalty; see Barclay, 51 U.S.L.W. at 5212; the trial court only later addressed the weight of the mitigating circumstance as compared to all the aggravating circumstances, a determination that must be made before the death sentence can be imposed. See, id., Fla Stat. § 921.141(2)(b) & (c). Third, the court below failed to consider that petitioner suffered actual prejudice

because, under Elledge, the unconstitutional application of the "especially heinous, atrocious, and cruel" aggravating circumstance would have required a reversal for resentencing because of the existence of statutory mitigating circumstances.

The Court should grant the writ to determine whether petitioner's death sentence was premised upon an unconstitutionally broad application of the "especially heinous, atrocious, and cruel" aggravating circumstance in violation of Godfrey v. Georgia, and whether he suffered substantial and actual prejudice as a result.

IV. CERTIORARI SHOULD BE GRANTED TO DETERMINE WHETHER THE DELIBERATE AND CALCULATED INTRODUCTION BY A PROSECUTOR OF INADMISSIBLE EVIDENCE SUGGESTING THAT THE STATE'S KEY WITNESS HAD TAKEN AND PASSED A POLYGRAPH IN AN IMPERMISSIBLE EFFORT TO BOLSTER THE CREDIBILITY OF THE WITNESS IN THE JURY'S EYES VIOLATES THE SIXTH, EIGHT AND FOURTEENTH AMENDMENTS

The prosecutor himself admitted that he deliberately adduced the fact that the key prosecution witness had taken and passed a polygraph. R. 1425. Despite the fact that the prosecutor deliberately introduced clearly inadmissible evidence that contributed to petitioner's conviction and sentence, the courts below denied any relief. The Florida Supreme Court held that, while reprehensible, the prosecutor's impermissible stratagem was harmless error as to guilt or innocence because of the overwhelming nature of the evidence. 303 So. 2d at 636, 637. The magistrate adopted that conclusion, as well as the suggestion of the Florida Supreme Court that the jury might not have construed the answer to mean that McLaughlin already had taken and

taken and passed the polygraph. App. A at 79a-82a; 303 So. 2d at 635. The court of appeals could not even find the federal issue. 695 F.2d at 1313.

Each court erred. It is doubtful whether the impermissible accreditation of the state's key witness can ever be harmless beyond a reasonable doubt; it is a proposition that, once stated, reveals its own implausibility. But, even if it may be harmless because of the overwhelming nature of the evidence of petitioner's guilt, that only answers half the question. As pointed out by the dissenting Florida justices, there is still the question of the effect of this impermissible tactic on the constitutionality of petitioner's sentence of death. In finding aggravating circumstances to justify the death penalty, both the trial court, in imposing the sentence, and the Florida Supreme Court, in affirming it, relied upon McLaughlin's testimony regarding petitioner's statements. Thus, it is clear that the issue of McLaughlin's credibility was central to the question of petitioner's sentence; there is no reason to believe that the jury did not also think so. It cannot be said that the impermissible bolstering of McLaughlin's credibility was harmless error when the delicate discretionary decision to impose the death sentence in fact depended upon a belief in the substance of McLaughlin's testimony.

Similarly, the record reveals that the suggestion that the jury might not have construed the answer to mean that McLaughlin already had taken the polygraph is unsupportable. The state itself contended that it was proper

rehabilitation to show "that the State had good reason to attach credibility to his testimony." Sullivan, 303 So. 2d at 636. Moreover, McLaughlin testified that the deal was: "That I would have to take a polygraph test and pass it." R. 1394. That could only have indicated that he had, in fact, done so because he already had told the jury that the deal was struck and concluded.

> Q. Now, sir, when you say that your sentence is going to be determined by your testimony is there any question in your mind what your sentence is going to be?
>
> A. No.
>
> Q. Has there been an agreement as to what your sentence is going to be?
>
> A. Yes.
>
> Q. What is that?
>
> A. Life.

R. 1392 (emphasis added). Indeed, the speculation that the jury might have thought that McLaughlin was still to take and pass the polygraph is absurd. Why would a prosecutor first put a witness on the stand and have him take a polygraph afterward?

Finally, the avoidance of the issue by the court of appeals on the theory that there was only a state law evidence question entirely misses the point. Petitioner's claim is not premised solely upon the admission of the evidence. That might be no more than a state law question. But, petitioner's claim is directed at the prosecutor's deliberate misconduct in employing a stratagem to introduce otherwise inadmissible evidence in an effort to obtain petitioner's conviction and death sentence. This Court has affirmed that the due process clause remains as a safeguard

against such deliberate prosecutorial subversion of the right to a fair trial. In denying special procedural protections for a photographic show-up, the court recognized that:

> Pretrial photographic identifications, however, are hardly unique in offering possibilities for the actions of the prosecutor unfairly to prejudice the accused. [For example,] . . . testimony of witnesses may be manipulated. . . . In many ways the prosecutor, by accident or by design, may improperly subvert the trial. The primary safeguard against abuses of this kind is the ethical responsibility of the prosecutor, who, as so often has been said, may "strike hard blows" but not "foul ones." Berger v. United States, 295 U.S. 78, 88 (1935); Brady v. Maryland, 373 U.S. 83, 87-88 (1963). If that safeguard fails, review remains available under due process standards. See Giglio v. United States, 405 U.S. 150 (1972); Mooney v. Holohan, 294 U.S. 103, 112 (1935); Miller v. Pate, 386 U.S. 1 (1967); Chambers v. Mississippi, 410 U.S. 284 (1973).

United States v. Ash, 413 U.S. 300, 321 (1973) (footnote omitted; emphasis added).

The deliberate manipulation of the evidence in this case cannot meet those due process standards. This is not a case of a prosecutor carried away in the heat of an improvisatory closing argument. See Donnelly v. Christoforo, 416 U.S. 637 (1974). Rather, it is a case involving a deliberate artifice by the prosecutor to skirt the rules and manipulate evidence to obtain both a conviction and death sentence, a "knowing use" of improper evidence. Miller v. Pate, 386 U.S. 1, 7 (1967). Indeed, because this case involves the deliberate interjection of polygraph evidence, it is one where "[a]s in Miller, manipulation of the evidence by the prosecution was likely to have an important effect on the jury's determination." Donnelly, 416 U.S. at 647. Polygraph evidence is considered impermissible

precisely because it will certainly be given too much weight by the factfinder because of its ostensible accuracy and "scientific" trappings of certainty. "We are all aware of the tremendous weight which such tests would necessarily have in the minds of a jury." People v. Leone, 25 N.Y.2d 511, 307 N.Y.S.2d 430, 255 N.E.2d 696, 700 (1969). Where the witness's testimony regarding petitioner's statements and mental state helped procure both the conviction and the death sentence, the deliberate attempt impermissibly to bolster his credibility must involve a question of due process.

> The jury's estimate of the truthfullness and reliability of a given witness may well be determinative of guilt or innocence, and it is upon such subtle factors as the possible interest of the witness in testifying falsely that a defendant's life or liberty may depend.

Napue v. Illinois, 360 U.S. 264, 269 (1959). This jury knew of McLaughlin's interest in testifying, yet the prosecutor was able to skirt the rules and suggest that he was not testifying falsely because he had passed a polygraph. This was a deliberate subversion of the process upon which "a defendant's life [and] liberty may depend."

A prosecutor "may prosecute with earnestness and vigor -- indeed, he should do so. But, while he may strike hard blows, he is not at liberty to strike foul ones." Berger v. United States, supra, 295 U.S. 78, 88 (1935). The Court should grant the writ to detemine whether due process is a bulwark against such foul blows and whether the prosecutor's conduct in this case violated due process and the eight amendment.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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August 15, 1983

APPENDIX A

Recommendation of the United States Magistrate on Petition for a Writ of Habeas Corpus, dated March 19, 1981.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 79-2721-Civ-JAG

ROBERT A. SULLIVAN,

Petitioner,

v.

LOUIE WAINWRIGHT, et al.,

Respondents.

_____/

REVIEW AND RECOMMENDATION ON PETITION FOR WRIT OF HABEAS CORPUS

THIS CAUSE came before the Court on Petition for Writ of Habeas Corpus filed by the petitioner, Robert A. Sullivan, pursuant to 28 U.S.C. § 2254 and was referred to United States Magistrate, Patricia Jean Kyle, for hearing, review and recommendation.

I.

The petitioner is in the custody of the State of Florida having been convicted on November 8, 1973 of First Degree Murder in the Circuit Court of the Eleventh Judicial Circuit, In and For Dade County, Florida following a jury trial. The petitioner was sentenced to death on November 12, 1973.

II.

The Petition for Writ of Habeas Corpus and Amended Petition for Writ of Habeas Corpus set forth numerous grounds for which relief is sought:

1. Denial of Effective Assistance of Counsel:

   The petitioner was denied his right to effective assistance of counsel;

2. Witherspoon Violations:

   a. During jury selection, twelve (12) veniremen were excused for cause based on their personal view of the death penalty thereby denying the petitioner's right to due process;

b. The petitioner was denied his right to a trial by a jury composed of a representative cross-section of the community;

c. The petitioner was subjected to cruel and unusual punishment;

d. The petitioner was denied his right to trial by an impartial jury;

3. Improper Introduction of Evidence:

The prosecution improperly introduced evidence that a witness had taken a polygraph examination;

4. Denial of Cross-examination:

The petitioner was denied his right to cross examine a state witness;

5. Denial of Self-representation:

The petitioner was denied his right to self-representation;

6. Improper Prosecutorial Comment:

The petitioner was denied due process because of improper prosecutorial argument during the penalty phase of his trial;

7. Arbitrary Sentence:

The petitioner was sentenced to death arbitrarily;

8. Jury Instructions:

a. The jury received improper instructions during the penalty phase of the trial; and

b. The petitioner was denied due process because the jury was instructed that he had the burden of proving any mitigating circumstances;

9. Illegal Search and Seizure:

Evidence and statements obtained pursuant to an illegal search and seizure were improperly admitted during the petitioner's trial;

10. Faulty Indictment:

The petitioner was charged under a faulty indictment;

11. Denial of Due Process at Motion to Vacate:

The petitioner's absence from the evidentiary hearing held on his Motion to Vacate was a denial of his right to due process;

12. Denial of Due Process by the Supreme Court of Florida:

Following his appeal of the denial of his Motion to Vacate and oral argument of this appeal before the Supreme Court of Florida, the petitioner was not afforded the opportunity to brief and argue his questions, therefore, he was denied his right to due process.

The respondent, following hearing on the Petition, moved to strike the petitioner's allegations of ineffective assistance of counsel.

Exhaustion of State Remedies.

Following his conviction, the petitioner filed a direct appeal to the Supreme Court of Florida. Four points were presented in this appeal:

POINT I

Whether or not the trial court erred in denying defendant's Motion for Mistrial upon the State's witness referring to a polygraph test;

POINT II

Whether the trial court erred in admitting into evidence an enlarged photograph of the victim in view of the fact that all issues pertaining to relevancy of the photograph had been stipulated between counsel;

POINT III

Whether the arrest of Robert Sullivan was legal and the subsequent seizure of tangible evidence and a confession lawful;

POINT IV

Whether the provisions of Chapter 72-724, Laws of Florida, 1972, amending Florida Statutes, Sections 775.082, 782.04 and 921.141:

1. Is cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments to the Constitution of the United States?

2. Is an arbitrary infliction of punishment as to deprive the defendant of life, liberty or property without due process of law?

3. Is a denial of the right to a jury trial insured by the Sixth Amendment of the United States Constitution?

4. Is unconstitutional by embracing more than one subject therein?

The Court felt that only Point I of the petitioner's appeal was of any merit and therefore gave full consideration to that issue. The Court affirmed the petitioner's conviction on November 27, 1974. Sullivan v. State, 303 So.2d 632 (Fla. 1974).

The petitioner then filed a Petition for Writ of Certiorari with the United States Supreme Court. The questions presented were as follows:

> 1. Whether the imposition and carrying out of the sentence of death for the crime of first degree murder under the law of Florida violates the Eighth or Fourteenth Amendment to the Constitution of the United States?
>
> 2. Whether a prosecutor's knowing, calculated and intentional introduction at a criminal trial in the jury's presence of manifestly inadmissible and prejudicial testimony suggesting that a state's witness has taken and passed a polygraph test is "harmless error" under the due process clause of the Fourteenth Amendment in a capital case where petitioner was subsequently convicted and sentenced to death?

This Petition was denied by the Supreme Court on July 6, 1976, Sullivan v. Florida, 428 U.S. 911 (1976), as was his request for a re-hearing. Sullivan v. Florida, 429 U.S. 873 (1976).

Subsequently, on March 15, 1979, the petitioner filed a Motion to Vacate, Set Aside or Correct Sentence Pursuant to Rule 3.850 of the Florida Rules of Criminal Procedure. The Motion raised issues identical to those presented in the case at bar. The Motion to Vacate was denied by the trial court on May 15, 1979. The petitioner's appeal of that denial was filed on May 25, 1979 with the Supreme Court of Florida. Sullivan v. State, 372 So.2d 938 (Fla. 1979). Further, on June 19, 1979, prior to the Supreme Court of Florida issuing its decision on the petitioner's appeal, the Governor of the State of Florida signed a warrant directing that the petitioner's execution take

place on June 27, 1970. The petitioner immediately filed a Motion for Stay of Execution. The Court set the Motion for oral argument to be heard June 22, 1979. Following oral argument, the Court entered an order affirming the trial court's denial of the petitioner's Motion to Vacate and denying the petitioner's Motion to Stay Execution. Sullivan v. State, 372 So.2d 938 (Fla. 1979).

In early July of 1979, the petitioner filed his Petition for Rehearing which was denied by the Supreme Court of Florida on July 24, 1979. Sullivan v. State, 372 So. 938 (Fla. 1979).

This Court also notes that on August 9, 1979, the petitioner filed an Amended Petition for Writ of Habeas Corpus before this Court.

It appears that the petitioner has exhausted his available state remedies within the meaning of 28 U.S.C. § 2254(b) and (c). Picard v. Connor, 404 U.S. 270 (1971); Fay v. Noia, 372 U.S. 391 (1963); Galtieri v. Wainwright, 582 F.2d 348 (5th Cir. 1978).

FINDINGS OF FACT

References to proceedings will be referred to as follows:

R. - Record of Proceedings in the trial court and on appeal.

TH. - Transcript of Hearing on the petitioner's Petition for Writ of Habeas Corpus held before this Court.

Pursuant to hearing held on March 6, 7 and 10, 1980 the Court heard the testimony of numerous petitioner's witnesses and respondent's witnesses and gave the petitioner every opportunity to present any and all witnesses he might wish to call on any and all of the legal issues raised by him in his Petition for Writ of Habeas Corpus. (TH. 605-614). In fact, after some new matters had been raised by the petitioner on March 6 and 7, the Court recessed the hearing until March 10, 1980 to permit the petitioner, if he so desired, to locate additional witnesses or documents and bring them

before the Court. (TH. 605-614).

Following the hearing, several Motions for Extensions of Time to Respond by the petitioner were granted by the Court in an effort to give the petitioner every opportunity to prepare his presentation thoroughly and completely, and after giving the respondent some additional time, this matter is now ripe for review.

The petitioner was arrested on April 17, 1973 shortly after he left Keith's Cruise Lounge in Hallandale, Florida. (TH. 20, 30). He was taken to the Dade County Public Safety Department Jail and incarcerated for the alleged murder of a night manager of a Howard Johnson's motel, Donald Schmidt. Approximately one week later, the petitioner spoke with an attorney from the Public Defender's Office and appeared before the trial court for preliminary hearing. (TH. 20). The petitioner's next court appearance set for May 10, 1973, was postposed until June 4, 1973 when Ray Windsor was appointed by the court to represent the petitioner. (TH. 20-21). Mr. Windsor was not present at the time of his appointment but met briefly with the petitioner at his arraignment on June 8, 1973). (TH 21).

Prior to the hearing on the petitioner's Motion to Suppress filed by Mr. Windsor and by the public defender representing the petitioner's co-defendant, Reid McLaughlin, and scheduled for September 20, 1973, the petitioner spoke with Mr. Windsor approximately three times. (TH. 21).. The petitioner also provided Mr. Windsor with voluminous correspondence setting forth, among other items his views on his defense, the witnesses who should be called to testify and the names of people who should be deposed. (TH. 36-40; Petitioner's Exhibit 4).

In light of his conversations with and correspondence from the petitioner, Mr. Windsor believed that the petitioner had committed the crime of murder with which he was charged. (TH. 585-588). Thus, Mr. Windsor explored a number of possible admittance and avoidance defenses, i.e., insanity, intoxication

and self defense. However, these defenses were ruled out as being unacceptable in light of the facts. (TH. 588-590).

The petitioner asked Mr. Windsor to utilize an alibi defense "in spite of the fact that he had made an admission to me that he was involved." (TH. 590-591). Mr. Windsor dismissed the petitioner's request for an alibi defense:

> As far as I was concerned, he wanted me to manufacture for him an alibi defense, go out and locate alibi witnesses and put them on the stand, have them perjure themselves. (TH. 591).

Mr. Windsor also considered the possibility of a plea bargain but the State refused that proposition. (TH. 591).

Despite his reluctance to raise the petitioner's alibi defense, Mr. Windsor, through an investigator, attempted to contact a lawyer, Thomas Murphy, who the petitioner said could testify on his behalf. (TH. 595, 603).

Prior to hearing on the Motion to Suppress, Mr. Windsor and the co-defendant's public defender took numerous depositions of potential state and defense witnesses. As a strategy move, Mr. Windsor agreed to permit the co-defendant's counsel to take most of the depositions alone thus permitting Mr. Windsor time to read the depositions, evaluate inconsistencies in the testimony and retake the depositions armed with greater information and for impeachment possibilities. (TH. 591-592).

At hearing on the Motion to Suppress, Mr. Windsor incorrectly went forward with the burden of proof but, in light of the wide latitude given by the trial judge and the testimony at depositions, he did not believethis error had any effect on the outcome of the Motion. (TH. 596-598).

Before withdrawing as counsel for the petitioner, the petitioner gave Mr. Windsor a "diary" in which the petitioner admitted his guilt and described the crime. (TH. 594-595;

Respondent's Exhibit 26). In light of this "diary" (subsequently turned over to succeeding counsel), the facts known to Mr. Windsor regarding the petitioner's guilt and the petitioner's insistence on an alibi defense, Mr. Windsor did not object to the petitioner's request that he withdraw as counsel. (TH. 593-595). Thus, pursuant to the petitioner's letters and motions to the trial judge, the Honorable Edward Cowart, hearing was held on September 26, 1973, and Mr. Windsor was relieved as the petitioner's counsel. (TH. 22-33; Petitioner's Exhibits 1, 2, 3 and 23).

At hearing before this Court, the events surrounding Mr. Windsor's withdrawal were placed in their proper perspective. The petitioner clearly was unhappy with Mr. Windsor as, among other reasons, Mr. Windsor refused to raise the petitioner's alibi defense or assist in presenting what he believed to be perjured testimony to the Court, as he believed Mr. Windsor was not prepared at the Motion to Suppress and as he believed Mr. Windsor to be inadequate to the task at hand. (TH. 22-35, 188-189; Petitioner's Exhibits 1-3). Mr. Windsor was unhappy with his client for the reasons already set forth. (See also, TH. 189). At hearing on the petitioner's motion to replace Mr. Windsor, Judge Cowart was not advised that.

> ...Mr. Sullivan wanted me to pursue an alibi defense for him. Apparently he would have wanted to call certain witnesses who he would be contending would be able to place him at a scene different from the place of the alleged homicide at the time and it was absurd, because prior to that time Sullivan had communicated to me.. his participation in this matter and : now he wanted me to establish or manufacture an alibi defense for him.
>
> I didn't go to the Court and say Judge, Mr. Sullivan wants me to suborn perjury and Mr. Sullivan wants to get on the stand and perjure himself. (TH. 593-594).

Rather, Mr. Windsor

> ...deliberately told the Court, being rather vague, merely advising the Court that he wanted me to utilize a particular defense, but I felt it wasn't in his best interest and as a result of that, we had a communication breakdown. (TH. 79-80, 594).

In retrospect, Judge Cowart noted at hearing before this Court that at the time of his appointment as counsel to the petitioner, Mr. Windsor "was very well qualified, [a] very competent young lawyer, very studious young lawyer." (TH. 76). In appointing Mr. Windsor, Judge Cowart considered Mr. Windsor's "known competency to me, his ability to handle a case such as this, as I have seen him, as I said, on a daily basis, and the fact it's one that - he is one that we use frequently as far as appointments are concerned." (TH. 76-77). Further, at hearing on the Motion to Suppress where the petitioner contended Mr. Windsor was unprepared, Judge Cowart stated that, in his opinion, the petitioner received effective assistance of counsel in a "long, involved and ...well legally argued motion." (TH. 78).

On September 26, 1973, after Judge Cowart permitted Mr. Windsor to withdraw, the Judge appointed Carling Stedman, who met with the petitioner and then immediately withdrew owing to a conflict. (TH. 40-41, 80).

On October 4, 1973, Denis Dean was appointed by Judge Cowart to represent the petitioner. (TH. 41, 80). A private investigator also was appointed by the court. (TH. 43). Mr. Dean received Mr. Windsor's files from Mr. Stedman, and the petitioner corresponded with Mr. Dean regarding the petitioner's proposed defenses. (TH. 41-43; Petitioner's Exhibits 5, 6, 7 and 8).

Approximately one week after his appointment, Mr. Dean, accompanied by the private investigator, Mr. Bennett, met with the petitioner. (TH. 43-44). At this meeting and through sub-

sequent correspondence, the petitioner, among other things, advised Mr. Dean of the petitioner's version of the facts, gave Mr. Dean instructions on the conduct of his defense and provided lists of proposed witnesses. (TH. 47; Petitioner's Exhibit 6).

For example, the petitioner:

1. asked for depositions and statements taken (TH. 100-101);
2. asked Mr. Dean to retake certain depositions (TH. 102; Petitioner's Exhibit 7);
3. asked Mr. Dean to file a motion to rehear all motions filed by Mr. Windsor (TH. 102; Petitioner's Exhibit 7);
4. asked Mr. Dean to examine all reports on the case as well as any fingerprint reports (TH. 103);
5. asked Mr. Dean to locate an unnamed Florida State Trooper allegedly seen by the petitioner the night of the crime (TH. 103-104; Petitioner's Exhibit 7);
6. asked Mr. Dean to investigate Howard Johnson's security set-up (TH. 104-106);
7. asked Mr. Dean to check whether a laboratory blood analysis was conducted on a tire iron found in the petitioner's car (TH 106-107; Petitioner's Exhibit 7);
8. asked Mr. Dean to investigate a warrant for the petitioner's arrest on embezzlement charge (TH. 107-108);
9. advised Mr. Dean of the facts supporting the petitioner's alibi defense (TH. 109-114);
10. told Mr. Dean the defense strategy the petitioner wished to pursue (TH. 108; Petitioner's Exhibit 8);
11. advised Mr. Dean of misrepresentations contained in a magazine article (TH. 112-114; Petitioner's Exhibit 9);
12. provided Mr. Dean with a list of questions to be asked witnesses at trial (TH. 114-116; Petitioner's Exhibits 10-12; and
13. provided Mr. Dean with a summary of alleged policy violations at the Howard Johnson's Motel (TH. 117; Petitioner's Exhibit 14).

Mr. Dean considered all of the petitioner's submissions. He was acutely conscious of the petitioner's alibi defense. (TH. 274) Mr. Dean through his private investigator, located one of the

petitioner's alibi witnesses, "Mike," who Mr. Dean determined was unable to help as Mike could not testify to specific time sequences. (TH. 275). No laboratory blood analysis was conducted on the tire iron, and Mr. Dean requested none as he was advised the tire iron had been wiped off. (TH. 278-279). Mr. Dean evaluated the pleadings filed by Mr. Windsor and found them acceptable even though he would not have gone forward with the burden of proof at Motion to Suppress. (TH. 279-281). Mr. Dean redeposed thirteen of the witnesses in the case (TH. 316-317) and obtained numerous reports (TH. 317-318); Respondent's Exhibit 13). Of those redepositions, the petitioner was present at all but one. (TH. 319-320). Although the petitioner wished to redepose a witness, Frank Barden, Mr. Dean declined to do so as he believed Mr. Barden's testimony would be irrelevant. (TH. 350-352).

Prior to trial, Mr. Dean felt the State had an extremely strong case against the petitioner and evaluated other possible defenses. (TH. 306). Mr. Dean considered an insanity defense but found no basis for such a defense. (TH. 309-311; Respondent's Exhibits 25 and 28). He considered a defense of intoxication but found this defense to be inconsistent with the petitioner's testimony. (TH. 312-313). Mr. Dean contemplated a plea bargain, but the State would not waive the death penalty. (TH. 348). Mr. Dean considered raising a self defense but rejected this defense as being inconsistent with the petitioner's testimony. (TH. 313). He considered contending that the petitioner's co-defendant coerced the petitioner into the crime but, again, this was inconsistent with the petitioner's testimony. (TH. 316). All of these defenses were considered and rejected in light of the petitioner's proposed testimony and in light of the petitioner's insistence on taking the stand. (TH. 307).

Thus, despite the apparent lack of specificity of the alibi defense and in light of the petitioner's adamant decision to

testify in his own behalf, Mr. Dean prepared for trial. (TH. 307, 314, 321-322). Mr. Dean's defense rested basically on the petitioner's testimony and a trial strategy aimed at creating reversible error sufficient to overturn the petitioner's conviction on appeal. (TH. 262-264, 273, 306-308).

In preparing for trial, Mr. Dean and the petitioner drew up questions for cross-examination of the State's witnesses and impeachment materials. (TH. 264-322). Mr. Dean filed a Motion for Change of Venue which was denied. (TH. 323). He prepared jury voir dire questions and filed an unusual Motion for Individual Selection of Jurors which was granted by the court. (TH. 323-324). The petitioner's Motion to Assist Counsel was denied by the trial judge. (TH. 144).

A trial date was set for November 26, 1973 but, owing to Mr. Dean's desire for further investigation, the petitioner waived Speedy Trial, and the trial date was continued. (TH. 45-46). Perhaps owing to a conflict of his trial schedule, Mr. Dean was unable to go to trial on the petitioner's case on the date set, and the Court moved up the trial date. (TH. 347). Although Mr. Dean believed he was ready to go to trial and did not object to an accelerated trial date, he nevertheless filed a Motion for a Continuance which was denied. (TH. 144, 348-350). Mr. Dean then made final preparations for trial. (TH. 352-353).

Mr. Dean and the petitioner stipulated to a number of matters with the State. (TH. 254-259). For example, to avoid the jury seeing gory color glossy photos of the victim and crime scene, Mr. Dean and the petitioner stipulated to the cause, manner, date, time and circumstances of the victim's death. (TH. 117-122, 353-355). The petitioner and Mr. Dean concurred that any test on the tire iron would be irrelvant. (TH. 356-357, 360-361). As Mr. Dean did not want to prejudice the petitioner by permitting the jury to hear testimony from the

What difference if error

victim's distraught wife, he and the petitioner stipulated to the identity of the victim. (TH. 357-358).

The petitioner's contentions regarding footprints at the scene was discarded by Mr. Dean owing to the number of prints at the death site and the fact that no plaster casts had been taken there. (TH. 360). Similarly, Mr. Dean discarded the idea of utilizing any fingerprints which may have been found on the tire iron owing to its having been wiped off, that the tire iron was the petitioner's and that it was found in the petitioner's car. (TH. 361). Palm prints on the tape used to bind the victim's arms and hands were not helpful as the prints were not those of either the petitioner or his co-defendant and were otherwise unidentifiable. (TH. 362-364). Despite the assistance of the private investigator, Mr. Dean was unable to locate the petitioner's witness, Mr. Murphy or the unnamed Florida Highway Patrolman, and the petitioner's proposed witness, Gilbert Jackson, was not in Miami at the time of the murder and therefore of no help. (TH. 365, 370).

Prior to trial, Mr. Dean did not seek to have the Motion to Suppress reheard as he wished to reserve any error which might be present for pruposes of appeal. (TH. 145, 366-367).

Trial commenced on November 5, 1973. (TH. 46-47, 266-267). In an almost unprecedented precedure, the trial judge permitted individual jury selection, sequestering each potential juror and each juror chosen. (TH. 323-324). Throughout jury selection, Mr. Dean consulted with the petitioner who expressed no dissatisfaction with the manner or selection of the jurors. (TH. 259-262, 325-326). In fact, at the petitioner's insistence, Mr. Dean asked voir dire questions of the jurors pertaining to homosexuality as the petitioner was an avowed homosexual. (TH. 373-376). This was geared to elicit sympathy and eliminate prejudiced jurors.

During trial, the petitioner never expressed any dissatisfaction with Mr. Dean, his conduct or his approach. (TH. 147, 327). Before concluding cross-examination of a witness, Mr. Dean consulted with the petitioner on possible further questions. (TH. 327). At trial, Mr. Dean tried to impeach Frank Barden. (TH. 264, 370-371). Mr. Dean made numerous objections to testimony and asked all pertinent questions on direct examination proposed by the petitioner. (TH. 376-377). At the conclusion of the State's case, Mr. Dean moved for a Directed Verdict of Acquittal which was denied. (TH. 371-372). Mr. Dean also prepared and presented closing argument. (TH. 324-325). He was satisfied with most of the proposed jury instructions but made some objections. (TH. 372-373). No instruction was given over Mr. Dean's objection. (TH. 372-373). The defendant was convicted of first degree murder.

The petitioner was sentenced to the death penalty on November 12, 1973.

Prior to trial and sentencing, the petitioner had insisted that Mr. Dean arrange for him to take a polygraph examination. (TH. 191-192, 276-278, 377-379). Mr. Dean, throughout these proceedings, was aware of the petitioner's conflict with Mr. Windsor and deliberately avoided asking the petitioner whether he had committed the crime although Mr. Dean was aware of the petitioner's complicity in the crime by the time of preliminary hearing. (TH. 288-302, 316-317, 338). At sentencing, Mr. Dean's death phase argument was limited, and he did not object to the Court's ultimate findings that aggravated circumstances existed in the case. (TH. 259-262, 268-271). Mr. Dean, however, had prepared for the hearing, had called every witness requested by the petitioner except one which they discussed and deleted and presented his entire argu-

ment despite his being apprised immediately before the hearing of the results and content of the polygraph examination. (TH. 268-271, 320-321, 325, 328).

On October 31, 1973, polygraph examiner, Warren Holmes, had met the petitioner and before administering the polygraph examination, took background information from the petitioner. (TH. 516-518). After the examination was given, Mr. Holmes conversed with the petitioner, told him he had not told the truth during the examination and showed the petitioner where the examination revealed the petitioner's untruthfulness. (TH.. 518-520). Faced with this, the petitioner told Mr. Holmes that he had lied during the examination and the truth was that he had told Mr. Windsor he was guilty, he wanted to take the stand and lie, Mr. Windsor refused to help him commit perjury, and so he obtained new counsel. (TH. 190, 520-521). The petitioner also told Mr. Holmes that he didn't confide in Mr. Dean because he didn't want to put Mr. Dean in a compromising position. (TH. 521). The petitioner then admitted to the crime, detailed the method and reason for the crime and spoke of his alibi defense. (TH..521, 529-530). The petitioner denies telling Mr. Holmes of his criminal involvement, denies admitting the murder to Mr. Windsor, denies telling Mr. Holmes that he told Mr. Windsor he wanted to lie on the stand and denies any statements as to his motive. (TH. 190, 193-205). The petitioner also contends that he was unaware of the polygraph results until 1979 (TH. 378-379), but the record clearly contradicts this assertion. The polygraph and Mr. Holmes' report was prepared and presented to Mr. Dean. (TH. 521-522, 532; Respondent's Exhibit 12).

Following his conviction and sentence, the petitioner appealed to the Supreme Court of Florida which ultimately denied his appeal. Mr. Dean, court appointed for trial, agreed to represent the petitioner on a pro bono basis in post-trial proceedings. (TH. 328-331). Despite the petitioner's present

testimony, there is no evidence to suggest the petitioner was dissatisfied with Mr. Dean during trial or during this appeal. (TH. 143, 147, 149-150, 333, 339-340, 342, 346; Respondent's Exhibits 11 and 42).

Subsequently, Mr. Dean represented the petitioner before the United States Supreme Court on a pro bono basis. The petitioner never complained. In fact, the first time Mr. Dean heard of the petitioner's allegations of ineffective assistance of counsel was when the petitioner filed his Motion to Vacate before the state court more than five years after Mr. Dean represented the petitioner at trial and on appeal and after Mr. Dean had represented the petitioner pro bono before the Supreme Court of Florida, the United States Supreme Court, in a class action suit, in 1977 clemency proceedings before the Governor of Florida and was not formally out of the case until the beginning of 1979. (TH. 171, 176, 334-337, 339-345; Respondent's Exhibits 2, 7, 11 and 42).

The petitioner agrees that he made no allegations of Mr. Dean's ineffective assistance of counsel in 1973 or 1974. (TH. 149-150). In 1975, the petitioner corresponded with an NAACP attorney, David Kendall, who was working on behalf of other death row inmates in a clemency class action suit and complained to Mr. Kendall of Mr. Dean's representation. (TH. 150-151). Despite this, the petitioner did not register his dissatisfaction with Mr. Dean who continued to represent the petitioner, pro bono, before the courts of this land (TH. 150-151). The petitioner admits he knew how to raise an ineffective assistance of counsel issue as early as 1973, did not do so, waited until 1975 to complain and then took Mr. Kendall's advice to wait again to raise the issue at a future habeas corpus proceeding. (TH. 151-153). Apparently, both the petitioner and his new confidant, Mr. Kendall, believed Mr. Dean effectively was handling the

petitioner's case well into 1976. (TH. 155-159). Even after this period, Mr. Dean was asked by Mr. Kendall to file a Motion under Rule 3.800(b) of the Florida Rules of Criminal Procedure, and Mr. Kendall asked for Mr. Dean's assistance at hearing. (TH. 160-161, 170). Despite the petitioner's alleged dissatisfaction with Mr. Dean, he never asked Mr. Dean to withdraw and never asked Mr. Kendall to take over. (TH. 160-162). Mr. Dean represented the petitioner before the Parole Board and participated in the late 1976, early 1977 clemency class action suit filed by the NAACP without objection by the petitioner. (TH. 159, 162, 173-175; Petitioner's Exhibit 11). Miami attorney Tobias Simon also participated in that class action, but the petitioner never complained to him of Mr. Dean's representation. (TH. 168).

March 15, 1979, the date of filing of the Motion to Vacate under Rule 3.850 of the Florida Rules of Criminal Procedure alleging ineffective assistance of counsel, saw the end of Mr. Dean's assistance to the petitioner. (TH. 177).

The Court is obliged to note from the petitioner's own testimony that Mr. Kendall noted Mr. Dean's intelligence and concern in 1974 (TH. 234-235; Petitioner's Exhibit 18), and Mr. Dean's ability as counsel was noted in 1975 and 1976 (TH. 237-240; Petitioner's Exhibits 19 and 20). Despite lack of funds and despite knowing the petitioner had lied to him and had admitted committing the murder to him, Mr. Dean continued to represent the petitioner without fees. (TH. 127-134, 218).

Mr. Dean's competence as counsel is supported by the record in the case and by the record of proceedings before this Court. Judge Cowart noted that the State's case against the petitioner was very strong and that Mr. Dean handled the case well and presented an "excellent" and "competent" defense. (TH. 80-

85). In fact, like Mr. Dean, the first hint that Judge Cowart had of the petitioner's dissatisfaction with Mr. Dean was in 1979 upon the filing of the Rule 3.850 Motion to Vacate. (TH. 84).

At hearing on the Motion to Vacate, held on May 1, 1979, Judge Ellen Gable had ruled that owing to the petitioner's status as a security risk, she would not order him to be brought for the hearing. (TH. 57-58, 62, 65-69). In light of her decision, however, Judge Gable had advised the petitioner's counsel, Roy Black, that she not only would consider anything which the petitioner wished to submit in writing but also would accept the petitioner's affidavits as the truth. (TH 63, 69-70). These affidavits were filed on the date of hearing. Pursuant to that hearing and the affidavits submitted by the petitioner, Judge Gable ruled that Mr. Dean had effectively represented the petitoner and thus denied the Motion to Vacate. (TH. 60-65). In fact Judge Gable believed then and still believes that Mr. Dean's reputation is excellent, and he effectively and adequately represented the petitioner. (TH. 60-65).

The petitioner's primary issue before this Court is the alleged ineffective assistance of both counsel Ray Windsor and Denis Dean. The petitioner's primary complaint against them is that they did not investigate his alibi claim and locate the witnesses the petitioner contended could exonerate him.

As his alibi, the petitioner contends he was a Keith's Cruise Lounge, a lounge catering in large part to homosexuals, the entire period of time before and after the murder of Donald Schmidt was committed in the first hours of the morning of April 9, 1973. (TH. 544). The petitioner contends Thomas Murphy, allegedly an attorney from Boston; "Mike" (Carmack),

a bartender; Peter Tighe, a bartender and William Harlow, a bar patron were witnesses to his presence at Keith's Cruise Lounge during the late evening hours of April 8 and early morning hours of April 9.

The Court notes that neither Mr. Dean nor Mr. Windsor were able to locate Mr. Murphy despite efforts by a private investigator. (TH. 598, 368). "Mike" Carmack was located by Mr. Dean through the private investigator, but Mike Carmack's testimony was not helpful to the petitioner as he was unable to remember specific times. (TH. 275).

At hearing before this Court, both Mr. Tighe and Mr. Harlow were present and testified. Mr. Tighe testified that in April of 1973, he was employed at Keith's Cruise Lounge and knew both the petitioner and the man known as Thomas Murphy as both men were friendly and were customers in the lounge. (TH. 403-404). On the evening of April 8, 1973, Mr. Tighe remembered the petitioner but no other customer and that a party celebrating Mr. Harlow's eighteenth birthday was being held at the lounge. (TH. 408, 417). Mr. Tighe stated he first saw the petitioner on that evening at approximately 11:30 P.M. (TH. 409-411); that the petitioner was at the bar sitting with someone else at 7:00 P.M. when Mr. Tighe came to work (TH. 418); that the petitioner came in at a later time after Mr. Tighe had already arrived (TH. 421); that the petitioner came into the bar between 7:00 - 10:00 P.M. (TH. 422-423); that the petitioner left the bar before 9:30 P.M. when Mike Carmack arrived between 9:30 - 10:00 P.M. (TH. 422-423); that the petitioner was in the bar for approximately one half hour before the petitioner left the first time (TH. 423); that the petitioner returned to the bar at approximately 11:30 P.M. (TH. 433-434) and that the petitioner ultimately left the bar with others at approximately 3:30 A.M. to go to another late

night tavern. (TH. 433, 453).

Mr. Tighe remembered seeing the petitioner walk into the bar after Mr. Harlow and his party arrived (TH. 434-437, 438-439, 443-444); he next saw the petitioner between 12:20-12:35 A.M. (TH. 443-444) and again saw the petitioner at 2:00 A.M. talking to Mike Carmack (TH. 444); he saw the petitioner during and after the bar's floor show between 2:00 - 3:30 A.M. (TH. 446) and the petitioner was still there at closing time at approximately 3:30 A.M. (TH. 453). However, Mr. Tighe was unable to see who, if anyone, left or re-entered the bar between 12:30 - 2:00 A.M. (TH. 449).

Mr. Tighe also testified that the petitioner often ran a bar tab and, indeed, ran such a tab on the night of April 8 and paid the tab at a later date. (TH. 407, 484-486).

Mr. Tighe next saw the petitioner on the evening of his arrest--during the late hours of April 16, early hours of April 17, 1973. (TH. 482). Shortly after his arrest, the petitioner wrote to Mr. Tighe requesting his help and advising Mr. Tighe someone would contact him. (TH. 405, 428-432). However, not having been contacted and despite reading of the petitioner's conviction and sentence, Mr. Tighe remained silent and did not come forward to help the petitioner. (TH. 406, 428-431). Nor did Mr. Tighe write down his recollections as he "didn't think it was this serious." (TH. 428-431).

Mr. Tighe was first contacted on this case in June of 1979 (TH. 412) and subsequently signed an affidavit stating he couldn't remember times or dates (TH. 464-472) despite his apparent acute ability to remember specific times and dates a year later at hearing before this Court. Some conflict also appears between his affidavit and Mr. Tighe's testimony at hearing on the type of cocktail ordered exclusively by the

petitioner. (TH. 475-476). Upon contacting Mr. Tighe and presenting the affidavit for his signature, the person who presented the affidavit, Virginia Snyder, also asked Mr. Tighe to contact the petitioner's counsel if Mr. Tighe was able to locate Thomas Murphy. Despite this, upon later seeing Mr. Murphy and later still upon being contacted by employees of the Boston Globe and being shown a photograph of Mr. Murphy, Mr. Tighe again contacted no one and did nothing. (TH. 487-489).

In spite of Mr. Tighe's protestations that he could have remembered more clearly if he had been contacted earlier, could have produced the dated bar tab but now remembers everything clearly, the Court is not assured that Mr. Tighe's present recollections are accurate in light of other facts before the Court. (TH. 407, 412, 484-486, 495).

Mr. William Harlow also demonstrated remarkable recollections of the evening of his eighteenth birthday party. (TH. 534) Mr. Harlow recalled that he and his party arrived at the bar at approximately 11:20 P.M. (TH. 540), and he saw the petitioner shortly after his arrival (TH. 535, 542-543). Mr. Harlow spoke to the petitioner for approximately five minutes. (TH. 544). He next saw the petitioner during the entire floor show, and right after the floor show he saw the petitioner at the front bar. (TH. 535, 546-548). Mr. Harlow and his party left the bar between 3:30 - 4:00 A.M. (TH. 550).

Mr. Harlow never told the petitioner his address where he has now lived for over 25 years. (TH. 536-537).

The Court cannot help but note that Mr. Harlow and the petitioner were not close friends and wonder that Mr. Harlow should have kept such close watch over the petitioner during and after a floor show the night of the celebration of Mr.

Harlow's eighteenth birthday. (TH. 535-536, 543-548). The Court also notes that after Mr. Tighe had received the petitioner's letter requesting help, he saw Mr. Harlow numerous times during the next three years yet never mentioned the petitioner's predicament to Mr. Harlow. (TH. 555-556). However, after being contacted by members of the petitioner's defense fund, Mr. Harlow also signed an affidavit and later, he and Mr. Tighe met and spoke at length and in great detail about the evening of April 8, 1973. (TH. 561-563, 567-570). Mr. Harlow also discussed the case with a Fort Lauderdale News or Hollywood Tattler reporter in July or August of 1979. (TH. 565-566).

The above Findings of Fact represent the pertinent aspects of the testimony before this Court as well as testimony in the records of the trial and post-trial proceedings. Page references to these latter proceedings are not itemized in the Findings of Fact but will be referred to in part, in the Recommendations of Law.

RECOMMENDATIONS OF LAW

A. CREDIBILITY:

In presenting its findings of fact, the Court properly has made certain credibility determinations. United States v. Raddatz, ___ U.S. ___, 100 S.Ct. 2406 (1980); United States v. Whitmire, 595 F.2d 1303 (5th Cir. 1979); United States v. Watson, 591 F.2d 1058 (5th Cir. 1979). As the transcript of hearings and findings of fact reflect, the Court has disbelieved certain testimony given by the witnesses and has given more weight to some testimony over other testimony. Such judicial decisions have been made in light of the record with prior proceedings, the overall testimony given, the manner in which it was presented and the demeanor of those testifying before the Court.

B. THE MOTION TO STRIKE:

The respondent has filed a Motion to Strike the petitioner's complaints of ineffective assistance of counsel owing to the petitioner's invocation of his fifth amendment rights during direct examination by the respondent's counsel when the petitioner was called as the respondent's witness at hearing before this Court.

The Court highlights the fact that the petitioner first took the stand and testified on his own behalf during the petitioner's presentation of his case. He then was cross-examined by the respondent, and at no time during this cross-examination did the petitioner invoke his fifth amendment rights. During that direct and cross-examination, this Court properly refused to allow the petitioner to invoke an attorney-client privilege as he was alleging the ineffective assistance of those same attorneys and was presenting testimony on his ineffectiveness claims. See, United States v. Woodall, 438 F.2d 1317 (5th Cir. 1970); Hearn v. Rhay, 68 F.R.D. 574 (E.D. Wash. 1975). Thus, on the Court's instruction, the petitioner testified, and the respondent was able to cross-examine him on matters relating to his claim of ineffective assistance of counsel.

However, upon being called by the respondent as its witness in its direct presentation of the case, the petitioner repeatedly invoked his fifth amendment right. In ruling that the petitioner could invoke this right at this stage of the proceeding, the Court properly exercised its discretion to limit inquiry into areas where the respondent already had the opportunity to inquire of the petitioner on cross-examination. See, United States v. Palmer, 536 F.2d 1278 (9th Cir. 1976); Melendrez-Rodriguez v. United States, 441 F.2d 1109 (9th Cir. 1971); Lewis v. United States, 373 F.2d 576 (9th Cir. 1967); United

States v. Johnson, 285 F.2d 35 (9th Cir. 1960).

The respondent relies primarily on the case of Brown v. United States, 356 U.S. 148 (1958) and on cases citing the Brown decision, i.e., United States v. Woodall, supra; United States v. Lustig, 555 F.2d 737 (9th Cir. 1977); United States v. Higgenbotham, 539 F.2d 17 (9th Cir. 1976). However persuasive these cases may be, they stand for the proposition that once a defendant takes the stand in his own defense, he may not invoke his fifth amendment rights upon cross-examination. This simply was not the issue presented to the Court! Rather, following the conclusion of the petitioner's case, the respondent called the petitioner as its witness and attempted to elicit testimony from the petitioner either contrary to that already given by the petitioner or testimony which could be self-incriminatory should the petitioner's Petition for Writ of Habeas Corpus be granted and he be awarded a new trial. The petitioner clearly was entitled to "stop short" at this point. Brown v. United States, supra at 154. See, Arndstein v. McCarthy, 254 U.S. 71 (1920).

The Court has examined this matter in order to prepare a full and complete presentation to the District Court. However, this Court emphasizes that the disposition of the petitioner's Petition does not rise or fall on the grant or denial of the respondent's Motion to Strike as this Court's recommendation, below, on the petitioner's issue of effective assistance of counsel has been offered and is adverse to the petitioner's claims on their merits.

C. THE PETITIONER'S CLAIMS:

I. Denial of Effective Assistance of Counsel

The petitioner has alleged that he was denied his sixth amendment right to effective assistance of counsel in numerous

instances.

a. THE PUBLIC DEFENDER:

The petitioner does not attack the representation of his first court-appointed counsel, the Public Defender of Dade County, as the public defender quickly recognized a conflict existed in representing both the petitioner and his co-defendant, Reid McLaughlin, and withdrew. Despite the petitioner's request to the court to appoint a specific private practitioner, Robert Josephberg, the trial court appointed private counsel, Raymond Windsor, to represent the petitioner.

b. RAYMOND WINDSOR:

The petitioner first attacks the representation of this second court-appointed attorney, Raymond Windsor. The petitioner contends:

> Windsor did not interview petitioner at the Dade County Jail for 90 days. When petitioner finally had an interview with his counsel, for the first time in the litigation, it was well after three months had passed since his arrest. He asked Windsor to find and interview a number of witnesses to be used at the motion to suppress statements and evidence, and as alibi witnesses at the trial. No attempt was made to locate and interview these witnesses.
>
> Depositions were scheduled of all the State's witnesses by the Public Defender's Office, who represented co-defendant Reid McLaughlin. Counsel for the petitioner only appeared at four such depositions and failed to appear at all for 17 depositions. He failed to appear for the following statements:
>
> (a) Homicide Detective Lonnie Lawrence, Raymond Jones and Glenn Aguirre, who had substantial investigative duties in this case;
>
> (b) Edward McAllister, an investigator for Mastercharge who testified regarding the credit cards found on petitioner;
>
> (c) Mel Zahn and Eddie Stone, tech-

nicians with the Crime Lab who examined the crime scene and collected the physical evidence;

(d) Ronald Shuk, a fingerprint technician who examined the adhesive tape with the unidentified fingerprint;

(e) Terrence Igoe and Ruenes, handwriting experts;

(f) Trudy Enderle, police court reporter who took petitioner's statement;

(g) Lee Beamer, the Assistant Medical Examiner who did the autopsy on Donald Schmidt;

(h) Robert Hayden, a Howard Johnson's employee who was a close friend of petitioner;

(i) Robert Crow, Michael Hammerschmidt, Alexander Prendes, Oscar Manganilla and William Tucker.

Windsor did file motions to dismiss (TR. 1720-23, 1740-41) motions attacking the constitutionality of the grand jury selection process (TR. 1724-31), motions to suppress petitioner's statements (R. 1735-36), and to suppress physical evidence (R. 1737-39).

At the hearing on the motions to suppress, Windsor accepted the burden of proof and going forward with the evidence despite the lack of a search warrant (TR. 64, 370), and presented no legal argument at the hearings (TR. 335). Contrary to petitioner's requests, Windsor failed to call any witnesses in support of these motions (TR. 64, 370).

The motion to suppress evidence was conducted on September 20, 1973; several days prior to the hearing, petitioner notified the Court in writing that his counsel was not properly representing him and that he wanted new counsel appointed to represent him. The Court took no action on this request until the end of the evidentiary hearing (TR. 375-76) and set a hearing on petitioner's request several days later.

On September 26, 1973 a hearing on the effectiveness of counsel was held in chambers. Windsor advised the court that he had a conflict with petitioner, was unable to properly communicate with him, and admitted that he refused to follow petitioner's requests on how the

defense should be prepared and argued (TR. 383-84). The court withdrew Windsor as counsel and appointed Carling Stedman (TR. 387). Stedman reported to the Court on October 4, 1973 and told the Court he had not yet interviewed petitioner (TR. 400). During a recess he did so and subsequently declined the appointment (TR. 403). Denis Dean was then appointed (TR. 404).

1. Evidence taken at hearing on the petitioner's Petition for Writ of Habeas Corpus before this Court does not support the petitioner's contentions that Mr. Windsor's actions, or lack of action, amounted to a denial of effective assistance of counsel. For example, the record reflects that Mr. Windsor first met with the petitioner on June 8, 1973--four days after his appointment and spoke with the petitioner approximately three times between June 8, 1973, and September 20, 1973. Blame cannot be laid on Mr. Windsor that he was not appointed until June 4, 1973--approximately two months after the petitioner's arrest.

2. The petitioner next contends that although he asked Mr. Windsor to find and interview a number of alleged witnesses for use both at Motion to Suppress and as alibi witnesses at trial, Mr. Windsor neither attempted to locate nor to interview these witnesses. In part, the record supports these contentions. Mr. Windsor did attempt to locate a lawyer, Thomas Murphy, who the petitioner said could testify on the petitioner's behalf, but Mr. Windsor was unable to find Mr. Murphy. Mr. Windsor testified at hearing before this Court that, in light of the evidence and his conversations with the petitioner, he believed that the petitioner had committed the crime of murder with which he was charged. He also believed the petitioner sought Mr. Windsor to assist him in manufacturing an alibi defense and place perjured testimony before the trial court.

The law is clear that a charge of ineffective assistance of counsel may not lie where counsel fails to obtain testimony

of an alibi witness where such testimony could not be considered an alibi. Mays v. Estelle, 610 F.2d 296 (5th Cir. 1980). Further, Mr. Windsor would not be obliged legally to locate and interview witnesses not at the scene or in the city at the times at issue and whose testimony would be irrelevant. United States v. Johnson, 615 F.2d 1125 (5th Cir. 1980).

In the case of State v. Eby, 342 So.2d 1087, 1089-1090 (Fla. 2nd DCA, 1977), the Court noted:

> a decision not to raise certain possible defenses or call certain defense witnesses is ordinarily a matter of personal judgment and strategy within the prerogatives of defense counsel. As such, it is not a proper predicate for a collateral attack on the competence of counsel unless it is so irresponsibly exercised as to constitute "inadequate" representation. Here, the undisputed testimony of trial counsel revealed a deliberative, well-founded decision to pursue the course taken which, on its face, is not unreasonable nor irresponsible. No evidence was before the trial court to support a contrary finding; and neither second-guessing nor substituting the court's own hindsight judgment for that of trial counsel will suffice to reject as "inadequate" the role of trial counsel.

However, in the case of Bell v. Georgia, 554 F.2d 1360, 1361 (5th Cir. 1977), the petitioner furnished his attorney with names and partial addresses of alleged alibi witnesses which the petitioner's counsel "neither made any effort to contact... nor otherwise undertook any independent investigation of his client's sole possible defense." The Court found this utter failure by counsel rose to the level of ineffective assistance of counsel.

The facts of the case at bar reveal that Mr. Windsor did not attempt to locate the petitioner's alleged alibi witnesses (except for an unsuccessful attempt to find Mr. Murphy) as Mr. Windsor believed the petitioner had committed the murder and wanted Mr. Windsor to assist him in manufacturing a perjured alibi defense. In this regard, the Court notes the deposition testimony of the witnesses which, in conjunction with the petitioner's revelations to Mr. Windsor, readily support Mr. Windsor's belief in his client's guilt.

> It is the duty of the lawyer to conduct a prompt investigation of the circumstances of the case and explore all avenues leading to facts relevant to guilt and to a degree of guilt or penalty. American Bar Association Project on Standards for Criminal Justice, Standards Relating to the Prosecution Function and the Defense Function § 4.1 (tent. draft 1970). An attorney does not provide effective assistance if he fails to investigate sources of evidence which may be helpful to the defense. See, e.g., Rummel v. Estelle, 590 F.2d 103, 104-05 (5th Cir. 1979); Gaines v. Hopper, 575 F.2d 1147 (5th Cir. 1978); Bell v. Georgia, 554 F.2d 1360, 1361 (5th Cir. 1977); Gomez v. Beto, 462 F.2d 596 (5th Cir. 1972); Chalk v. Beto, 429 F.2d 225, 227 (5th Cir. 1970); King v. Beto, 429 F.2d 221, 224 (5th Cir. 1970), cert. denied, 401 U.S. 936, 91 S.Ct. 921, 28 L.Ed. 2d 216 (1971); Caraway v. Beto, 421 F.2d 636, 637-38 (5th Cir. 1970).

Davis v. Alabama, 596 F.2d 1214, 1217 (5th Cir. 1979), vacated as moot 446 U.S. 903 (1980). See, Gaines v. Hopper, 575 F.2d 1147 (5th Cir. 1978).

In retrospect, this Court both criticizes and comprehends Mr. Windsor's failure to attempt to locate witnesses which he reasonably believed would not be helpful and/or who only would suck him deeper into the quagmire of perjured testimony

proposed by his client.

> This Circuit has been strict in its requirement of the effective assistance of counsel. Brooks v. Texas, 381 F.2d 619, 624 (5th Cir. 1967). Effective counsel does not mean "errorless counsel, and not counsel judged ineffective by hindsight, but counsel reasonably likely to render and rendering reasonably effective assistance." MacKenna v. Ellis, 280 F.2d 592, 599 (5th Cir. 1960), modified 289 F.2d 928 (5th Cir. 1961), cert. denied, 368 U.S. 877, 82 S.Ct. 121, 7 L.Ed.2d 78 (1961). This necessarily "involves an inquiry into the actual performance of counsel in conducting the defense ... based on the totality of the circumstances and the entire record." United States v. Gray, 565 F.2d 881, 887 (5th Cir.), cert. denied, 435 U.S. 955, 98 S.Ct. 1587, 55 L.Ed.2d 807 (1978).

Beavers v. Balkcom, ___ F.2d ___ (5th Cir.)(Slip opinion 80-7018, decided Feb. 5, 1981).

The petitioner's complaint of Mr. Windsor's failure to attempt to locate alleged alibi witnesses must be viewed in the "totality of the circumstances and the entire record." This Court finds that even "with the aid of the refractive correction of hindsight" Mr. Windsor's failure to investigate these alleged alibi witnesses did not amount to a violation of the petitioner's sixth amendment right to the effective assistance of counsel during the pre-trial stages of proceedings in which Mr. Windsor represented the petitioner. United States v. Gray, 565 F.2d 881, 887 (5th Cir.), cert. denied 435 U.S. 955 (1978); Jones v. Estelle, 632 F.2d 490 (5th Cir. 1980). The Court notes that Mr. Windsor's representation of the petitioner was limited to pre-trial proceedings involving primarily legal issues, i.e., a motion to suppress where the testimony of the petitioner's proposed alibi witnesses would not be pertinent to the issue of the legality of the seizure of evidence. Thus, to paraphrase the Court in Mays v. Estelle,

supra, Mr. Windsor's failure to obtain the testimony of witnesses where such testimony could not be considered, does not amount to a violation of the petitioner's right to the effective assistance of counsel.

3. The petitioner also suggests that Mr. Windsor's failure to appear at and participate in the majority of the depositions taken of 17 witnesses constitutes a denial of his sixth amendment rights. The petitioner's contentions are without merit.

The burden of proof is on the petitioner in a habeas corpus proceeding, Swain v. Alabama, 380 U.S. 202, rehearing denied 381 U.S. 921 (1965); Rhodes v. Estelle, 582 F.2d 972 (5th Cir. 1978), and is a particularly difficult burden to carry in matters falling within the "amorphous zone known as 'trial strategy' or 'judgment calls.'" Jones v. Estelle, 632 F.2d 490 (5th Cir. 1980).

At hearing, Mr. Windsor testified that his decision to limit his participation at depositions was made, in part, owing to an agreement with the petitioner's co-defendant's counsel. Further, Mr. Windsor determined to absent himself from some depositions in order to provide himself with the opportunity to seek to retake the testimony once armed with the transcript from the first deposition and thus, hopefully, with impeachment materials. Such strategy does not appear unreasonable to this Court in light of the then-abundant evidence against the petitioner. Such strategy decisions are permissible and will not amount to a sixth amendment violation absent a clear showing that counsel's decision sapped the proceedings of fundamental fairness. See, United States v. Cowart, 590 F.2d 603 (5th Cir. 1979); Jackson v. Estelle, 548 F.2d 617 (5th Cir. 1977); Salazar v. Estelle, 547 F.2d 1226 (5th Cir. 1977); Cheeley v. United States, 535 F.2d

934 (5th Cir. 1976); United States v. White, 524 F.2d 1249 (5th Cir.), cert. denied 426 U.S. 922 (1976).

4. The petitioner's final complaint regarding Mr. Windsor's representation rests with his allegation that Mr. Windsor improperly went forward with the burden of proof at Motion to Suppress, presented no legal argument and failed to call witnesses.

Again, the Court is reminded of the burden of proof assumed by the petitioner and that to challenge "the effectiveness of his counsel ... [a petitioner] 'must do more than make conclusional assertions.'" Rhodes v. Estelle, supra; Woodard v. Beto, 447 F.2d 103, 104 (5th Cir.) cert. denied 404 U.S. 957 (1971). In the case at bar, the petitioner has alleged merely error and has failed to demonstrate to the Court any real and viable prejudice resulting to him from Mr. Windsor's actions at hearing on the Motion to Suppress. Rather, the record before this Court reflects wide latitude given Mr. Windsor by the trial judge. It further reflects that Judge Cowart believed any error by Mr. Windsor had no effect on the outcome of the Motion, and the petitioner received effective assistance of counsel in a "long, involved and ... well legally argued Motion." (TH. 78). This Court's examination of the entire record before it supports Judge Cowart's evaluations.

5. Whether dealing with the effectiveness of Mr. Windsor's representation of the petitioner or that of Mr. Dean, the Court cannot examine the petitioner's allegations in a vacuum nor can it rely heavily on retrospective hindsight analyses. Although the issue before this Court must be considered in light of the totality of counsel's performance, the Court also must carefully examine each individual allegation which would lend support to or abbrogate the petitioner's contentions of in-

effective assistance of counsel.

The right to effective assistance of counsel is safeguarded by both the due process clause standing alone and by the sixth amendment guarantee of effective representation (applied to the states through the fourteenth amendment). United States ex rel. Reis v. Wainwright, 525 F.2d 1269 (5th Cir. 1976); Alvarez v. Wainwright, 522 F.2d 100 (5th Cir. 1975); Fitzgerald v. Estelle, 505 F.2d 1334 (5th Cir. 1974).

Clearly, when counsel's representation is so blatantly incompetent as to render the whole proceeding fundamentally unfair, the due process clause is violated. The sixth amendment requirement of effective assistance of counsel has been held to mean not errorless counsel and not counsel judged ineffective by hindsight but counsel reasonably likely to render and rendering reasonably effective assistance. Kemp v. Leggett, ___ F.2d ___ (5th Cir.)(Slip opinion 80-7471, decided Jan. 27, 1981); Jones v. Estelle, 622 F.2d 124 (5th Cir. 1980); United States v. Johnson, supra; MacKenna v. Ellis, 280 F.2d 592 (5th Cir. 1960), modified 289 F.2d 928 (5th Cir.), cert. denied 368 U.S. 877 (1961); Herring v. Estelle; 491 F.2d 125 (5th Cir. 1974); United States v. Hand, 497 F.2d 929 (5th Cir. 1974); United States v. Fruge, 495 F.2d 557 (5th Cir. 1974). In this regard errors of judgment and legitimate tactical strategy on the part of an attorney do not constitute ineffective assistance of counsel. Moreover, the standard of "reasonably effective assistance of counsel" covers a greater range of counsel errors then does the fundamental fairness standard. Fitzgerald v. Estelle, supra. See, Knight v. State, ___ So.2d ___, Fla. Law Weekly 137 (decided Feb. 24, 1981).

The distinction once found

> between retained and court-appointed counsel as to the degree of protection due to criminal defendants has been

abolished by the recent Supreme Court decision in Cuyler v. Sullivan, 446 U.S. ___, 100 S.Ct. 1708, 64 L. Ed.2d 333 (1980), followed by this circuit in Perez v. Wainwright, 627 F.2d 762 (1980) on remand from the Supreme Court.

Kemp v. Leggett, supra.

A careful examination of each of the petitioner's points as they relate to Mr. Windsor's representation, in light of the entire record, convinces this Court that despite some recognizable errors of judgment and lack of action on some matters, Mr. Windsor's representation of the petitioner does not rise to the level of ineffective assistance of counsel as enunciated by our courts.

c. DENIS DEAN:

The petitioner also contends that his third court-appointed attorney, Denis Dean, failed to provide him with effective legal assistance. The petitioner alleges:

> Dean specifically requested a late November date so he would have sufficient time to prepare for trial (TR. 405). The court set November 26 for trial (TR. 406). Petitioner agreed to that date and waived his right to a speedy trial specifically stating that he did so in order to afford new counsel sufficient time to adequately prepare a defense (TR. 405, 406). Without petitioner's knowledge and agreement, this date was moved up to November 5, 1973 because Dean had a conflict of appearance on November 26.
>
> When Dean appeared for a pre-trial conference on November 1, 1973 he requested a continuance because he found he had insufficient time to prepare a proper defense. The court denied this motion (TR. 423). Due

to insufficient time to prepare, Dean was unable to provide petitioner with effective assistance of counsel.

During the pre-trial investigatory stage, petitioner gave Dean specific instructions on witnesses to contact and evidence to examine. The following areas and witnesses were not investigated by any of petitioner's counsel:

(1) Footprints -- at least two sets of footprints were found around the victim's body and the police technicians took plaster molds, yet no attempt was made to compare them with petitioner's shoes.

(2) A tire iron was seized from petitioner's car and McLaughlin testified Schmidt was struck in the head with it, yet no examination for blood was conducted.

(3) The adhesive tape which was used to bind Schmidt had the finger or palm print of someone other than the petitioner, yet no attempt was made to use this favorable evidence.

(4) Counsel failed to locate and interview the following witnesses:

(a) Gilbert Jackson, who was with petitioner at his arrest;

(b) Thomas Murphy, a lawyer who petitioner requested at his arrest and who was with him in Keith's Cruise Lounge;

(c) A State Highway Patrol trooper who McLaughlin testified stopped petitioner's car on the Tamiami Trail when Schmidt was in the car. Testimony that this incident did not occur would have contradicted McLaughlin's testimony;

(d) Mike and Peter -- bartenders at Keith's Cruise Lounge;

(e) Billy Harlow, Robert Porter and Richard Robbins, all alibi witnesses;

(f) Joseph Pineda;

(g) Robert Hayden and Otto Wittneir;

(h) Debbie Lambert, Carol Thomas; Robert Sheley, William Jenner, William

Meison Halder, Earl B. Allen, Detective Slattery and Carol Davis;

(i) Lee Beamer, an Assistant Medical Examiner.

Counsel stipulated to cause of death obviating Beamer's testimony despite the fact Beamer found evidence of only two shotgun wounds, and McLaughlin testified that Sullivan shot four times.

Dean stipulated to several contestable factual issues. He stipulated to the date of the murder (T. 436-37); identity of the decedent (T. 435-36); that the accused was wearing the decedent's watch at the time of arrest (T. 437); that Sullivan possessed the decedent's credit cards (T. 438); and best evidence rule concerning the charge receipts was waived (T. 438); chain of custody on various items (T. 440-41); and various photographs (T. 443-45). ...

At the close of all the evidence, Dean moved for judgment of acquittal but presented no argument or legal grounds. (T. 1518).

Dean filed no written requests for jury instructions (T. 1526-41).

Throughout the trial, commencing with jury voir dire, Dean emphasized that the petitioner was a homosexual (TR. seriatim). He never connected this prejudicial fact with any legal or factual issue.

At the penalty hearing, although Dean presented several witnesses, he did not request the trial court instruct the jury it could consider the evidence in mitigation, although it was without the statutory mitigating circumstances.

The argument by Dean to spare the petitioner's life consisted of two pages of transcript (T. 1677-79). The substance of that argument was to consider the mitigating circumstances mentioned by the prosecutor and the instructions to be given by the judge (T. 1679). In other words, Dean presented no argument intended to convince the jury to recommend mercy (T. 1677-79).

Sullivan's counsel did not raise the issue of the propriety of the judge's imposition

of the death penalty based upon those aggravating circumstances, was never raised in the Florida Supreme Court, because counsel simply misinterpreted the judge's order. As such, counsel is ineffective for overlooking such a glaring legal deficiency in the order, and there was no conceivable tactical reason for any competent lawyer to overlook it.

1. As his first point of contention, the petitioner charges that Mr. Dean requested a continuance which was denied. Mr. Dean then asked for a late-November trial date to permit him time to prepare. In light of Mr. Dean's need, the petitioner waived his right to speedy trial. However, without the petitioner's knowledge and possibly owing to a conflict in Mr. Dean's schedule, the trial date was moved up to November 5, 1973 without Mr. Dean's objection. As a result, the petitioner contends that Mr. Dean did not have sufficient time to prepare for trial, and the petitioner therefore was denied his sixth amendment rights.

At hearing before this Court, Mr. Dean testified that he and a private investigator met with the petitioner approximately one week after Mr. Dean's appointment as counsel. The petitioner also engaged in lengthy correspondence with and consulted with Mr. Dean before trial. Mr. Dean testified that he believed he was ready to go to trial even when he requested the continuance and was ready fully for trial even at the time of the accelerated trial date.

In the case of Hicks v. Wainwright, ___ F.2d ___ (5th Cir.) (Slip opinion 80-5097, decided January 5, 1981), the Court considered whether the denial of a continuance is grounds for federal habeas corpus relief. See, Valle v. State, ___ So.2d ___ (Fla.) Case No. 54,572, decided Feb. 26, 1981). In Hicks, supra, the Court said:

A motion for continuance is addressed to the sound discretion

> of the trial court and will not be disturbed on a direct appeal unless there is a showing that there has been an abuse of that discretion. United States v. Uptain, 531 F.2d 1281 (5th Cir. 1976); United states v. Gidley, 527 F.2d 1345 (5th Cir. 1976), cert. denied, 429 U.S. 841, 97 S.Ct. 116, 50 L.Ed.2d 110 (1977). When a denial of a continuance forms a basis of a petition for a writ of habeas corpus, not only must there have been an abuse of discretion but it must have been so arbitrary and fundamentally unfair that it violates constitutional principles of due process. See Gandy v. Alabama, 569 F.2d 1318, 1323 (5th Cir. 1978); Shirley v. North Carolina, 528 F.2d 819, 822 (4th Cir. 1975).
>
> The Supreme Court addressed this subject in Ungar v. Sarafite, 376 U.S. 575, 589, 84 S.Ct. 841, 849, 11 L.Ed.2d 921 (1964):
>
> The matter of continuance is traditionally within the discretion of the trial judge, and it is not every denial of a request for more time that violates due process even if the party fails to offer evidence or is compelled to defend without counsel. Contrariwise, a myopic insistence upon expeditiousness in the face of a justifiable request for delay can render the right to defend with counsel an empty formality. There are no mechanical tests for deciding when a denial of a continuance is so arbitrary as to violate due process. The answer must be found in the circumstances present in every case, particularly in the reasons presented to the trial judge at the time the request is denied.

In light of the circumstances in the case at bar, i.e., among other things, Mr. Dean's preparedness to go to trial, his investigation of the case, the voluminous correspondence between Mr. Dean and the petitioner and the short amount of time

between the scheduled November 26 trial date and the November 5 accelerated trial date, this Court finds no abuse of discretion by the trial judge, no violation of due process and no ineffective assistance given the petitioner by Mr. Dean.

2. The petition also contends that, owing to insufficient time and incompetence, Mr. Dean failed to investigate matters designated by the petitioner as crucial to his case. The facts of and testimony in this case do not support the petitioner's allegations.

Before addressing this issue in depth the Court again notes the burden of proof which the petitioner must meet under Rhodes v. Estelle, supra and Swain v. Alabama, supra. That Mr. Dean may have spent only a relatively short amount of time with the petitioner, especially in light of the petitioner's extensive correspondence with Mr. Dean, "does not of itself establish ineffectiveness of representation." Howard v. Beto, 466 F.2d 1356, 1357 (5th Cir. 1972); Jones v. Estelle, 632 F.2d 490 (5th Cir. 1980); Jones v. Estelle, 622 F.2d 124 (5th Cir. 1980); Carbo v. United States, 581 F.2d 91 (5th Cir. 1978); Woodard v. Beto, supra. Clearly, "time spent [in preparation] is only one of the elements to be considered, and the totality of the facts may not be over-ridden by a judicial stop watch." Herring v. Estelle, supra at 128; Doughty v. Beto, 396 F.2d 128 (5th Cir. 1968). However, "a lawyer who is not familiar with the facts and law relevant to his client's case cannot meet" the requirement of reasonably competent counsel. Herring v. Estelle, id. Thus, "a determination whether reasonably effective assistance of counsel was rendered [is] based on the totality of the circumstances and the entire record." United States v. Gray, supra at 887.

In order to adequately evaluate the petitioner's allegations that Mr. Dean failed to investigate the petitioner's defenses properly, it is essential to examine the petitioner's points individually.

The petitioner suggests:

a. Mr. Dean failed to compare plaster casts of footprints at the scene with the petitioner's shoes, yet testimony at hearing before this Court reveals that not only was the death site trampled by numerous footprints but no plaster casts were taken there by the police. Thus, Mr. Dean had nothing to compare.

b. Mr. Dean failed to conduct laboratory blood tests on the tire iron, yet Mr. Dean testified that he had been told the tire iron had been found in the petitioner's automobile, was the petitioner's tire iron which logically would have his fingerprints on it and had been wiped off, and the petitioner concurred in Mr. Dean's evaluation that any test on the tire iron would be irrelevant.

c. Mr. Dean failed to use as favorable evidence the adhesive tape which bound the victim's hands and which contained a finger or palm print. However, Mr. Dean testified that the prints not only were not those of the petitioner or his co-defendant but may have been the victim's and were otherwise unidentifiable.

d. Mr. Dean failed to locate and interview Gilbert Jackson, Thomas Murphy, an unnamed Florida Highway Patrol trooper, Mike and Peter, Billy Harlow, Robert Hayden, Joseph Pineda and other alleged witnesses. In fact, Mr. Dean did locate the bartender, Mike, who, after being interviewed by Mr. Dean's private investigator, was unable to help as he could not testify to specific time sequences. Mr. Dean, like Mr. Windsor, tried but was unable to locate Thomas Murphy or the unnamed Florida Highway Patrolman.

He did located Gilbert Jackson who was not of assistance to the petitioner's alibi defense as he was not in Miami at the time of the murder. Mr. Dean also located and deposed Robert Hayden and located Joseph Pineda who testified for the petitioner during the penalty phase of the trial.

e. Mr. Dean improperly stipulated to the cause of the victim's death obviating the Medical Examiner's testimony which conflicted with the petitioner's co-defendant's testimony on the number of times the victim was shot. Mr. Dean testified that as the petitioner was relying on an alibi defense, he and the petitioner together agreed to stipulate to the cause of death to prevent the jury from being prejudiced by viewing gory color glossy photos of the murdered man.

f. Mr. Dean also improperly stipulated to the date of the murder, the victim's identity, that the petitioner was wearing the victim's watch at the time of his arrest and possessed the victim's credit cards as well as committing a number of procedural errors. In light of Mr. Dean's testimony and the record before the Court, these contentions are without merit. With the concurrence of the petitioner, Mr. Dean stipulated to the cause, manner, date, time and circumstances of the victim's death to prevent the jury viewing the photos. They also agreed together to stipulate to the victim's identity and matters relating to his watch and credit cards to prevent prejudice to the petitioner from the jury hearing the testimony of the victim's distraught wife. No testimony was offered regarding Mr. Dean's alleged procedural errors which are directed primarily to issues with which Mr. Dean would have been thoroughly familiar owing to the extensive depositions and reports available to him.

Strategy But what of reversible error strategy?

The law is settled that an attorney does not provide effective assistance of counsel if he fails to investigate matters and sources of evidence which could be helpful to his defense. Davis v. Alabama, supra; Gaines v. Hopper, supra. An accused's counsel must be able to present "an intelligent and knowledgeable defense," Caraway v. Beto, 421 F.2d 636, 637 (5th Cir. 1970), but he is not obliged to pursue avenues clearly of no evidentiary value or simply because they are avenues he is instructed by his client to pursue. See, Jones v. Estelle, 632 F.2d 490 (5th Cir. 1980); United States v. Johnson, supra; Mays v. Estelle, supra.

It is clear from the record that Mr. Dean made many efforts to locate the petitioner's witnesses. He considered all of the evidence against the petitioner, evaluated all previously filed pleadings, redeposed 13 of the witnesses in the case with the petitioner present at redeposition in all but one instance, obtained numerous reports, considered other possible defenses than that of the petitioner's alibi defense and stipulated only to matters which he and the petitioner believed live testimony on would be prejudicial to the defense or constituted uncontested issues. This Court finds that Mr. Dean's actions and investigations were not only proper but, in many instances and with the petitioner's concurrence, constituted trial strategy. Easter v. Estelle, 609 F.2d 756 (5th Cir. 1980). Clearly, Mr. Dean's investigations, in part, were unsuccessful, but the petitioner's examples of his counsel's ineffectiveness, "viewed either individually or cumulatively, do not persuade us that his appointed counsel fell below the standard." United States v. White, supra at 1253. As the Court said in the White case, id:

> The best of lawyers have to take the facts as they are and can only do their best to present those facts in any available favorable light.

3. The petitioner also contends that Mr. Dean's failure to present argument or legal grounds when moving for a judgment of acquittal at the close of the State's case denied him effective legal assistance. Such a contention is not only without a scintilla of merit but "sort of ludicrous" in light of the weight of the case presented by the State. (TH. 372). There is no legal requirement for an attorney to present argument, legal or otherwise, when making a motion for a judgment of acquittal. The making of the motion is sufficient to preserve the record.

4. The petitioner's further suggestion that he was denied the effective assistance of his counsel insofar as Mr. Dean failed to submit written jury instructions is equally without merit. The facts of this case reveal clearly that proposed jury instructions were reviewed by him, he was satisfied generally with them, objected to some and no instruction was given which was objected to by Mr. Dean. See, Lucas v. Wainwright, 604 F.2d, 373 (5th Cir. 1979); United States v. Carter, 566 F.2d 1265 (5th Cir.), cert. denied 436 U.S. 956 (1978).

5. The petitioner's allegation that Mr. Dean emphasized his homosexuality as early as jury voir dire and throughout trial without connecting it to any legal or factual issue is also without merit. Mr. Dean's presentation of the issue was at the petitioner's insistence as the petitioner believed such a revelation would elicit sympathy and eliminate prejudiced jurors. (TH. 374-377).

6. The petitioner is greatly concerned with Mr. Dean's alleged failures during the penalty phase of the trial.

The record before the Court reveals that Mr. Dean and the petitioner consulted together at some length regarding this aspect of the proceedings. Mr. Dean, with the petitioner's assistance, prepared for the hearing and called every witness the petitioner requested except one which they deleted by unanimous agreement.. Despite Mr. Dean's being advised of the results of his client's polygraph exam moments before the hearing, Mr. Dean presented his entire agrument even if it covered only two pages of transcript. This Court believes that the petitioner's allegations of Mr. Dean's failure to present mitigating circumstances is without merit. This Court is thoroughly familiar with the entire record before it and suggests that, as in the case of Gibson v. State, 351 So.2d 948 (Fla. 1977), cert. denied 435 U.S. 1004, rehearing denied 436 U.S. 951 (1978), Mr. Dean's presentation of mitigating circumstances may have been limited because there was little in the way of mitigating circumstances to be offered. However, the record is clear that Mr. Dean's death phase argument was limited, and he did not object to the Court's ultimate findings that aggrevated circumstances existed in the case. Judge Cowart observed that the petitioner displayed not one scintilla of remorse and, without objection by Mr. Dean, Judge Cowart found this to be an aggravating circumstance. Mr. Dean viewed the Judge's comment not as a true finding but merely as an observation. (TH. 260-261).

At this critical phase of a criminal proceeding. the defense and the prosecution may present evidence to the jury in aggravation or in mitigation of the penalty. In the case of Songer v. State, 365 So.2d 696 (Fla. 1978), the Supreme Court of Florida determined

that evidence of and argument regarding aggravating circumstances must be confined solely to those listed in the statute. Further, in Lockett v. Ohio, 438 U.S. 586, 98 S.Ct. 2954 (1978), the United States Supreme Court found that any evidence of and argument in mitigation must be heard. On rehearing, the Songer court, supra at 700, contemplated the court's decision in Lockett, supra, and said:

> In Lockett, the Court held that Ohio's death penalty statute, which restricts the sentencing judge's consideration to the statutory list of mitigating factors, violates the eighth and fourteenth amendments to the United States Constitution. Appellant asserts that Florida's statute similarly prescribes an exlcusive list of mitigating circumstances, relying principally on language from our decision in Cooper v. State, 336 So.2d 1133 (Fla. 1976), to the effect that unlisted mitigating circumstances should not be considered in sentencing for a capital crime.
>
> In Cooper, this Court was concerned not with whether enumerated factors were being raised as mitigation, but with whether the evidence offered was probative. Chief Justice Burger, writing for the majority in Lockett, expressly stated that irrelevant evidence may be excluded from the sentencing process. 98 S.Ct. at 2965 n.12. Cooper is not apropos to the problems addressed in Lockett.
>
> As concerns the exclusivity of the list of mitigating factors in Section 921.141, the wording itself,[1] and the construction we have placed on that wording in a number of our decisions, indicate unequivocally that the list of mitigating factors is not exhaustive. This was noted, in fact, in Proffitt v. Florida, 428 U.S. 242, 96 S.Ct. 2960, 49 L.Ed.2d 913 (1976).

We have approved a trial court's consideration of circumstances in mitigation which are not included on the statutory list in Washington v. State, 362 So.2d 658 (Fla. 1978); McCaskill v. State, 344 So.2d 1276 (Fla. 1977); Chambers v. State, 339 So.2d 204 (Fla. 1976); Meeks v. State, 336 So.2d 1142 (Fla. 1976); Messer v. State, 330 So.2d 137 (Fla. 1976); and Halliwell v. State, 323 So.2d 557 (Fla. 1975), among others. Obviously, our construction of Section 921.141(6) has been that all relevant circumstances may be considered in mitigation, and that the factors listed in the statute merely indicate the principal factors to be considered. This construction of the statute, and its continued validity, were noted most recently in Spinkellink v. Wainwright, 578 F.2d 582, 620-21 (5th Cir. 1978), where the court was presented with an identical challenge to our death penalty statue based on Lockett v. Ohio.

Florida's death penalty statute, unlike the Ohio statute found invalid in Lockett, does not violate the eighth and fourteenth amendments to the United States Constitution.

At the penalty phase of the petitioner's trial, Judge Cowart determined that the jury's consideration generally would be limited to aggravating or mitigating circumstances as specifically delineated in the statute as well as matters the Court deemed relevant to sentencing. (R. 1619, 1625). The Court advised the jury of the aggravating circumstances which they would consider:

> One, that the crime for which the defendant is to be sentenced was committed while the defendant was under sentence of imprisonment.
>
> Two, that at the time of the crime for which he is to be sentenced, the defendant had been previously convicted of another capital offense or of a felony involving the use or threat of violence upon some

person. That the defendant knowingly created a great risk of death to any person. That the crime for which the defendant is to be sentenced was committed while the defendant was engaged or was in the commission of or in the attempt to commit or flight after committing or attempting to commit any robbery, rape, arson, burglary, kidnapping, aircraft piracy or unlawful throwing or placing or discharging of a destructive device or bomb.

That the crime for which the defendant is to be sentenced was committed for the purpose of avoiding or preventing a lawful arrest or escaping an arrest from custody. That the crime for which the defendant is to be sentenced was committed to disrupt or hinder the lawful exercise of any governmental function or the enforcement of the law. That the crime for which the defendant is to be sentenced was especially heinious, atrocious or cruel.

If you do not find that there existed any of the aggravating circumstances which have been described to you, it would be best, your duty to recommend a sentence of life imprisonment. (R. 1626-1627).

Judge Cowart also instructed the jury:

Should you find one or more of these aggravating circumstances to exist, it would then be your duty to determine whether or not sufficient mitigating circumstances exist to outweigh the aggravating circumstances found to exist.

The mitigating circumstances which you must consider if established by the defendant are these.

One, that the defendant had no significant history of prior criminal activity.

Two, that the crime for which the defendant is to be sentenced was committed while the defendant was

under the influence of extreme mental or emotional disturbance. That the victim was a participant in the defendant's conduct or consenting to the act. That the defendant was an accomplice in an offense for which he is to be sentenced but the offense was committed by another person and the defendant's participation was relatively minor.

That the defendant acted under extreme duress or under the substantial domination of another person. The capacity of the defendant to appreciate the criminal activity of his conduct or to conform his conduct to the requirements of the law was substantially impaired. The age of the defendant at the time of the crime.

Aggravating circumstances as I have outlined to you must be established beyond a reasonable doubt before they may be considered by you in arriving at your decision.

Proof of aggravating circumstances beyond a reasonable doubt is evidence by which the understanding judgment and reason of the jury are well satisfied and convinced to the extent of having a full, firm and abiding conviction that the circumstances had been proved to the exclusion of and beyond any reasonable doubt.

Evidence tending to establish an aggravating circumstance which does not convince you beyond a reasonable doubt of the existence of such circumstances at the time of the offense should be disregarded.

If one or more aggravating circumstances are established, you should consider all the evidence tending to establish one or more mitigating circumstances and give that evidence such weight as you feel it should receive in reaching your conclusion as to the sentence which should be imposed. (R. 1627-1629).

This Court has examined Florida Statute § 921.141, as it read at the time of the instruction, and finds that Judge Cowart's instructions to the jury track the statute and clearly

are proper.

Following these instructions, Mr. Dean presented all of the petitioner's requested witnesses except the one witness they mutually agreed to delete. The prosecution rested on the evidence presented at trial and presented no witnesses. Mr. Dean's direct examination of his witnesses and the prosecutor's cross-examination comprise 36 pages of testimony. (R. 1632-1654). At the conclusion of this testimony, counsel and the Court discussed the verdict form which was submitted to the jury still containing the phrase "death by electrocution" as requested by Mr. Dean and over objection of the prosecutor. (R. 1655-1656). Mr. Dean also objected to certain jury instructions proposed by the State. Mr. Dean then was given the right to closing argument while the State was permitted opening presentation.

In its presentation, the State evaluated its evidence, often being interrupted by Mr. Dean's objections which were consistently sustained. (R. 1663-1677). Mr. Dean then addressed the jury. (R. 1677-1679). The jury returned an advisory sentence recommending the petitioner be put to death.

Approximately one week later, Judge Cowart sentenced the petitioner to die and submitted written findings:

> This Court independent of, but in agreement with, the advisory sentence rendered by the jury does hereby impose the death penalty upon the defendant, ROBERT AUSTIN SULLIVAN, and in support thereof as required by 921.141(3), submits this, its written findings upon which the sentence of death is based.
>
> These findings are as follows:
>
> 1. That sufficient aggravating circumstances exist in this particular case that far outweigh any mitigating circumstances in the Record. The

death of this decedent occurred while the defendant was engaged in the commission of the crime of armed robbery. In addition thereto, the capital felony was committed for pecuniary gain, as the decedent had been robbed of his personal possessions as well as the possessions of the company he represented. These facts alone in this Court's judgment could justify the imposition of the death penalty, but this particular killing is far more useless and heinious than these.

2. The Court finds that the capital felony committed in this case was especially heinious, atrocious and cruel. The Supreme Court of Florida in consideration of the legalities of the recently enacted death sentence in the State of Florida decreed that these terms were to receive their common connotations and decreed that "heinious" meant "extremely wicked or shockingly evil," "atrocious" meant "outrageously wicked and vile" and "cruel" meant "a design to inflict a high degree of pain with utter indifference to or even enjoyment of the suffering of others." See State v. Dixon, 283 So.2d 1, pg.9, Florida Supreme Court, 1973. This Court cannot conceive of the commission of a crime that is more vividly described by these words as set forth by the Supreme Court than the one at bar. The defendant in this case saw fit to braggadociously state that he wanted to commit a "crime" which in his mind was to be "the perfect crime." The decedent was bound with hands behind his body with adhesive tape, mentally toyed with by the defendant as to operating and management techniques of the establishment where he worked, a place where the defendant himself had previously been employed. After this mental exercise, the decedent was led to a lonely spot in Dade County with hands still behind him and as he stumbled in the darkness, struck from behind with a tire iron, and then again from behind, while on the ground in a total helpless position, was mortally wounded with four blasts from a .12 gauge shotgun to the back of the head. This Court cannot conceive of a more conscienceless crime.

> 3. This Court has observed the demeanor and the action of the defendant throughout this entire trial and has not observed one scintilla of remorseness displayed, indicating fullwell to this Court that the death penalty is the proper selection of the punishment to be imposed in this particular case.
>
> This Court is not unmindful of the fact that the defendant is but 26 years of age and is further not unmindful of the fact that this is the defendant's first conviction. However, the aggravating circumstances in this case purely outweigh beyond and to the exclusion of every reasonable doubt in the Court's mind the mitigating circumstances. This Court does impose the death penalty upon the defendant ROBERT AUSTIN SULLIVAN. (R. 1694-1697).

In the case of Spinkellink v. Wainwright, 578 F.2d 582 (5th Cir. 1978), cert. denied 440 U.S. 976, rehearing denied 441 U.S. 937 (1979), the Court concluded that under Florida Statute § 921.141, in order to impose the death penalty, the trial court must find that sufficient statutorily defined aggravating circumstances exist which justify the imposition of a death sentence and that insufficient statutorily defined mitigating circumstances are present which would outweigh the aggravating circumstances. However, in examining this issue, this Court notes that one error in a finding of one aggravated circumstance will not invalidate the imposition of the death penalty if the sentence is otherwise supported by aggravating circumstances which outweigh circumstances in mitigation, Antone v. State, 382 So.2d 1205 (Fla. 1980), cert. denied ___ U.S. ___, 101 S.Ct. 287 (1980), and the trial judge's decision would not have been affected by elimination of the unauthorized aggravating circumstance. Brown v. State, 381 So.2d 690 (Fla. 1980). See, Lewis v. State, 377 So.2d 640 (Fla. 1979).

In his findings, Judge Cowart set forth three aggravating circumstances: the victim died while the petitioner was engaged in the commission of the crime of armed robbery committed for pecuniary gain; the capital felony was heinous, atrocious and cruel; and the petitioner failed to display remorse. Despite Mr. Dean's impression that Judge Cowart's finding of absence of remorse was merely observation by Judge Cowart, the findings as they were dictated into the record at the sentencing hearing lead this Court to conclude that Judge Cowart may have intended lack of remorse to be an aggravating circumstance. However, this Court marks Justice Ben Overton's analysis of this point in his concurring opinion in Sullivan v. State, 303 So.2d 632 (Fla. 1974) insofar as Justice Overton lists and discusses the aggravating circumstances relied upon by Judge Cowart in imposing the death penalty. Justice Overton never mentions absence of remorse as an aggravating circumstance recognized by the Supreme Court of Florida in affirming the petitioner's conviction and sentence.

The absence of remorse was not and is not a statutorily authorized aggravating circumstance and must be disregarded as a factor in imposing a death sentence. Riley v. State, 366 So.2d 19 (Fla. 1978). Thus, as aggravating circumstances are exclusive, Judge Cowart's finding of the petitioner's lack of remorse must be stricken. Miller v. State, 373 So.2d 882 (Fla. 1979).

When one or more aggravating circumstances are found, death may be presumed to be a proper sentence unless the aggravating factors are overridden by mitigating ones. Foster v. State, 369 So.2d 928 (Fla.), cert. denied 444 U.S. 885 (1979). After deleting Judge Cowart's finding of absence of remorse, two aggravating circumstances and two mitigating

circumstances remain as statutorily authorized findings: murder which occurred while the perpetrator was committing an armed robbery for pecuniary gain and a capital felony of a heinous, atrocious and cruel nature juxtaposed against the youth of the petitioner and the fact that the capital felony was his first conviction. Judge Cowart's remaining aggravating findings are proper and persuasive in light of the trial transcript. See, Antone v. State, supra; Brown v. State, supra; Lucas v. State, 376 So.2d 1149 (Fla. 1979). His findings of mitigating circumstances are also proper but, as Judge Cowart said, "the aggravating circumstances in this case purely outweigh beyond and to the exclusion of every reasonable doubt in the Court's mind the mitigating circumstances." (R. 1697). This Court concurs in Judge Cowart's evaluation. See, Lockett v. Ohio, supra; Proffitt v. Florida, 428 U.S. 242, rehearing denied 429 U.S. 875 (1976); Songer v. State, supra.

7. The petitioner's contention that Mr. Dean's failure to appeal the foregoing issue of Judge Cowart's imposition of the death penalty based on his findings of aggravating circumstances is without factual or legal merit.

As this Court has discussed, Judge Cowart's findings, even after striking the matter of remorse, are statutorily authorized and ample to support his sentence. Clearly, the petitioner's counsel may be deemed ineffective only if he had failed to raise viable issues on appeal. That Mr. Dean considered only certain issues worthy of presentation is evident from the record. The petitioner, like a "Monday morning quarterback," is now looking back from between bars and contending that his counsel was required to raise each and every possible point regardless of its merit. Mr. Dean examined the petitioner's case and determined which issues should be presented on

appeal. That other issues, issues without legal substance or factual support, went unpresented and unargued, does not deprive the petitioner of effective assistance of counsel. See, Anders v. California, 386 U.S. 738, rehearing denied 388 U.S. 924 (1967); McQueen v. Swenson, 498 F.2d 207 (8th Cir. 1974); Roberts v. State, 378 So.2d 887 (Fla.DCA 1979). The record in the case now before this Court reveals that Mr. Dean supported the petitioner's appeal to the best of his ability, and his conduct was neither so maladroit or inadequate as to run afoul of constitutional provisions. See, Passmore v. Estelle, 594 F.2d 115 (5th Cir. 1979); Thor v. United States, 574 F.2d 215 (5th Cir. 1978); Hooks v. Roberts, 480 F.2d 1196 (5th Cir. 1973).

8. This Court has examined all of the petitioner's allegations of ineffective assistance of counsel by Mr. Dean, including issues raised separately and discussed later in this opinion. Whether Mr. Dean's assistance is viewed as a whole or the petitioner's accusations are considered individually, this Court finds that Mr. Dean was "reasonably likely to render [and did render] reasonably effective assistance of counsel." MacKenna v. Ellis, supra at 599. In support of this determination, this Court does not rely upon the petitioner's representation by Mr. Dean subsequent to the petitioner's trial and appeal but must point out that, without objection or demurrer by the petitioner, Mr. Dean represented the petitioner, in whole or in part, for approximately five years in legal proceedings before the United States Supreme Court, in a class action suit, before the Parole Board in 1976, and in 1977 clemency proceedings. Although the five year time span is less in the case at bar than the 17 year span in that of Fitzgerald v. Estelle, supra, the petitioner's failure to complain for an extended period of time to authorities with power to act on his complaints must

reduce to some degree the credence to be given to the petitioner's position. An exceedingly detailed examination of the entire record and of the testimony given at hearing by Judge Cowart and Judge Gable convinces this Court that Mr. Dean's representation of the petitioner met and even exceeded the standard of reasonably effective assistance of counsel.

II. Witherspoon Violations

The petitioner has raised four errors which allegedly occurred during voir dire and which the petitioner contends were of such significance as to warrant granting the petitioner's Petition for Writ of Habeas Corpus. The petitioner alleges first that certain venirepersons improperly were excused for cause in violation of the capital case jury selection standards established in Witherspoon v. Illinois, 391 U.S. 510 (1968). The petitioner also contends that he was denied his constitutional right to a trial by a jury selected from a representative cross-section of the community. The petitioner further asserts that he was subjected to cruel and unusual punishment prohibited by the constitution because the jury selected was incapable of sustaining its understanding of the link between contemporary community values in relation to the penal system. Last, the petitioner contends he was subjected to trial by jurors who were not impartial and who were biased toward the prosecution.

a. Improper voir dire.

The petitioner specifically urges that of the 12 venirepersons challenged for cause by the state, six were excluded only because they voiced general objections to the death penalty or express conscientious or religious scruples against its imposition.

> The exclusion of veniremen for such reasons was recently held unconstitutional [by the United

States Supreme Court] as violative of the Sixth and Fourteenth Amendments in Witherspoon v. Illinois, 391 U.S. 510, 88 S.Ct. 1770, 20 L.Ed.2d 777 (1968). In Witherspoon, an Illinois Statute provided that cause for challenge in a capital case existed if the prospective juror states "that he has conscientious scruples against capital punishment, or that he is opposed to the same." The United States Supreme Court found that on its face, and also as it had been interpreted by the Illinois courts, the statute authorized the exclusion of jurors who might hesitate to return a verdict inflicting death.

Since a fair cross section of any community's population would presumably reflect many varying views on the imposition of the death penalty, a jury selected pursuant to the Illinois procedure would not be representative, and therefore not impartial, if its members were selected in such fashion as to exclude all who may have a distaste for the ultimate penalty. The United States Supreme Court held that such a jury would fall "woefully short of that impartiality to which defendant is constitutionally entitled on the question of whether the punishment would be death or life imprisonment."

The Witherspoon case, however, makes it equally clear that the State is also entitled to a jury that is similarly impartial and neutral as to penalty. In essence then, Witherspoon recognizes that both the prosecution and the defense in a capital case are entitled to jurors who are impartial as to penalty. A prospective juror is considered impartial, even though he may have a natural bias against capital punishment, so long as his bias is not so strong as to preclude or prevent him from at least considering the issue of punishment. The decision leaves unaffected the right of the prosecution to challenge for cause those prospective jurors who state that their reservations about the wisdom of the death sentence would prevent them from making an impartial decision as to defendant's guilt.

Williams v. State, 228 So.2d 377, 379 (Fla. 1969). The standard

established by the Court in Witherspoon, supra, has been followed in Lockett v. Ohio, supra; Davis v. Georgia, 429 U.S. 122 (1976); Maxwell v. Bishop, 398 U.S. 262 (1970); Boulden v. Holman, 394 U.S. 478 (1969).

Florida has required that the Witherspoon standard of impartiality be used by its courts. Chapter 913.13 of the Florida Statutes (superceded Florida Statutes § 932.20 (1970)), specifies:

> A person who has beliefs which preclude him from finding a defendant guilty of an offense punishable by death shall not be qualified as a juror in a capital case.

This statute, originally enacted in 1868, was controlling in Florida at the time the petitioner was tried and convicted. Its constitutionality had been challenged and upheld in Baker v. State, 225 So.2d 327 (Fla. 1969). Also challenged and upheld was the constitutionality of the provision of law which permitted prosecutors to challenge jurors for cause, and in Williams v. State, supra at 379, the Supreme Court of Florida determined that the Witherspoon decision, supra,

> leaves unaffected the right of the prosecution to challenge for cause those prospective jurors who state that their reservations about the wisdom of the death sentence would prevent them from making an impartial decision as to defendant's guilt.

See, Brown v. State, 381 So.2d 690 (Fla. 1980); Jackson v. State, 366 So.2d 752 (Fla. 1978); Perkins v. State, 228 So.2d 382 (Fla. 1969); Holland v. State, 22 So. 298 (Fla. 1897); Metzger v. State, 18 Fla. 481 (Fla. 1881).

At the petitioner's trial, Judge Cowart determined prior to jury selection that the Williams case, supra, was controlling authority in Florida. (R. 471). Thus, from the record, it is apparent to this Court that in selecting the jury, the trial judge was guided by the standards of Witherspoon, supra, and Williams, supra.

Following the Supreme Court's decision in Witherspoon, supra, evolving legal decisions have established a multi-prong test to determine whether the exclusion of a particular prospective juror would create a jury which was incapable of rendering an unbiased verdict. Essentially, to make this determination, a venireperson must be asked, as specifically as possible, whether he would be able to find a person guilty if he knew that the defendant could be sentenced to die if convicted. The Court then must determine the presence or absence of a Witherspoon violation from the venireperson's responses. Thus, if the prospective juror stated that with this knowledge of the potential consequences, he could never, under any circumstances, find a defendant guilty, the prosecutor could seek to remove the juror for cause without violating the precepts of Witherspoon, supra. However, a juror may not be removed for cause unless his personal views would prevent or substantially impair his performance as a juror. Adams v. Texas, ___ U.S. ___, 100 S.Ct. 2521 (1980). In the case of Burns v. Estelle, 626 F.2d 396 (5th Cir. 1980), the Fifth Circuit determined that to exclude a prospective juror without triggering a Witherspoon violation, the court must establish that the juror clearly would vote against a finding of guilt and/or imposition of the death penalty regardless of the evidence. See, Spinkellink v. Wainwright, supra; Jurek v. Estelle, 593 F.2d 672 (5th Cir. 1979), rehearing

en banc 623 F.2d 929 (5th Cir. 1980); Davis v. Georgia, supra; Mason v. Balkcom, 487 F.Supp. 554 (M.D. Ga. 1980); Grigsby v. Mabry, 483 F.Supp. 1372 (E.D. Ark. 1980).

If a prospective juror voices only general objections or expresses conscientous or religious scruples against the death penalty, he still can serve on a capital jury if the court is able to determine that, regardless of his personal opinions, he can be trusted to arrive at a verdict which conforms to the evidence presented and to the instructions given the jury by the judge. Thus, the venireperson must provide the court with an affirmative statement that he is able to reach an impartial decision regardless of his views. If the venireperson makes such an affirmative statement, a Witherspoon violation is triggered if he subsequently is excused for cause.

> A man who opposes the death penalty, no less than one who favors it, can make the discretionary judgment entrusted to him by the State and can thus obey the oath he takes as a juror. But a jury from which all such men have been excluded cannot perform the task demanded of it. Guided by neither rule nor standard, "free to select or reject as it [sees] fit," a jury that must choose between life imprisonment and capital punishment can do little more--and must do nothing less--than express the conscience of the community on the ultimate question of life or death.

Witherspoon v. Illinois, supra at 519.

If a Witherspoon violation occurs and a juror improperly is excused, counsel in Florida must make a contemporaneous objection to preserve the error. Rule 3.300, Florida Rules of Criminal Procedure; Paramore v. State, 229 So.2d 855 (Fla. 1969); vacated, in part, on other grounds, 408 U.S. 935 (1972). Failure to object contemporaneously will constitute a waiver

of the right subsequently to challenge the juror's removal. Marlin v. Florida, 489 F.2d 702 (5th Cir. 1974); State v. Matera, 266 So.2d 661 (Fla. 1972). However, despite the jurisdictional limitations of Wainwright v. Sykes, supra, the federal courts are not barred from considering this claim raised by a petitioner in his Petition for Writ of Habeas Corpus where he contends actual prejudice resulted to him. Francis v. Henderson, 425 U.S. 536 (1976). Therefore, despite any waiver in the trial court, whether error by counsel or not, this Court may and will consider the merits of the petitioner's claim of error resulting in prejudice to him.

On November 5, 1973, the petitioner's trial commenced and was presided over by Judge Edward Cowart. The State was represented by Assistant State Attorney Ira Dubitsky, and the petitioner was represented by Denis Dean. During jury selection, Judge Cowart granted Mr. Dean's request for a sequestered independent jury selection process whereby no prospective juror would hear the responses to questions given by another. During selection, 12 prospective jurors were excused for cause, and the petitioner alleges that six of the 12 venirepersons were excused improperly and in violation of the Witherspoon decision, supra. These six allegedly improperly excused jurors were Rose Hammiel (R. 564-570), Willie Jones (R. 746-760), Sylvia Gaines (R. 775-778), Anna Brown (R. 914-917), Marilyn Campbell (R. 1042-1045) and Betty Johnson (R. 1080-1083). The petitioner asserts that the voir dire examination of these six venirepersons did not reveal "unambiguously that [they] would automatically vote against the imposition of capital punishment no matter what the trial might reveal...." Witherspoon v. Illinois, supra at 516, n.9.

Clearly, under state and federal legal authority, it is essential that the court examine all of the testimony given by a prospective juror before it is able to ascertain whether a juror should be excused for cause and whether the excuse would trigger a violation within the scope of Witherspoon, supra.

1. Rose Hammiel

The testimony of this prospective juror which is material to the petitioner's Witherspoon allegations, supra, is as follows:

MRS. HAMMIEL: Would I consider the death penalty--

MR. DUBITSKY: Would you consider it?

THE COURT: Not would you consider giving it, but would you consider it, as a penalty, and consider it as such, as part of your verdict: That is the question.

MRS. HAMMIEL: I might give consideration to it, but I wouldn't say that I would give it.

MR. DUBITSKY: Well, I am not sure that I understand the answer, and I don't mean to belabor the point, and it is not something that you give a great deal of thought to, to specify with percision, what your feelings are, but, assuming that you considered the evidence, could you consider it realistically with a view toward the possible recommendation of the death penalty under some circumstances?

MRS. HAMMIEL: No, I don't think so.

MR. DUBITSKY: Are you saying that regardless of whatever the evidence is, in every case, you would recommend mercy?

MRS. HAMMIEL: Yes.

MR. DUBITSKY: The State would move to excuse Mrs. Hammiel for cause.

THE COURT: Do you wish to voir dire?

MR. DEAN: No, sir.

THE COURT: All right, ma'am, you are excused.

(R. 569-570).

The petitioner's allegations regarding this prospective juror are erroneous as it is unmistakably clear that Rose Hammiel would not return a verdict recommending the death penalty.

2. Willie Jones

In his attack on the removal of Mr. Jones, the petitioner has not made specific allegations of error. The transcript reveals that Mr. Jones admitted he had a difficult time understanding Mr. Dubitsky's and Mr. Dean's questions. After giving several confusing and contradictory responses to their questions, Judge Cowart told Mr. Jones that even he was confused and asked Mr. Jones to restate his position. Mr. Dubitsky then asked Mr. Jones:

MR. DUBITSKY: You understand, Mr. Jones, what the death penalty is; do you not, sir?

MR. JONES: Yes.

MR. DUBITSKY: Is it your feeling that we should not have the death penalty?

MR. JONES: Well, that's my feeling.

MR. DUBITSKY: Now, knowing that you have that feeling, can you state to the Court, whether you would be able to convict a person of a crime, which might carry the death penalty?

MR. JONES: Will I be able to--

MR. DUBITSKY: Would you be able to find a person guilty of a crime, if that crime might carry the death penalty?

MR. JONES: I guess so.

MR. DUBITSKY: Now, assuming that you do so, assuming that you vote guilty, of a crime which might carry the death penalty, the Judge will tell you that there would then be a second part of the trial, after the defendant has been found guilty, if he has been found guilty, and after that second part of the trial, additional evidence would be taken to determine whether or not the defendant should receive the death penalty.

Do you understand that?

MR. JONES: Additional--

MR. DUBITSKY: Evidence.

In other words, testimony.

People would come in here and recite facts that they think might bear on the question, or physical evidence may be introduced, and things like that.

Those are things which might have some bearing on whether or not the sentence should be the death penalty.

Do you understand that?

MR. JONES: In other words, it would be--

MR. DUBITSKY: It would be just like the first trial, except the question is not whether he is guilty or innocent, the question, at the second portion of the trial, would be whether or not he should receive the death penalty or mercy.

Do you understand that?

MR. JONES: Yes.

MR. DUBITSKY: What I am asking you, is this: Assume, if you would, that the evidence in the second part of the trial indicated that there were more factors against the defendant, than there were in his favor, there.

Would you then be able to recommend the death penalty?

THE COURT: You are indicating that you would not; is that correct?

MR. JONES: Correct.

MR. DUBITSKY: Is it your feeling, that no matter what the evidence was in the case, you--even though you might find the defendant guilty of first-degree murder--that you would then always recommend mercy?

MR. JONES: That's what it adds up to.

MR. DUBITSKY: I would renew the motion, your Honor.

THE COURT: Do you have anything, Mr. Dean?

MR. DEAN: No questions.

THE COURT: You may be excused, sir.

(R. 757-760).

While his conclusion was reached by a circuitous route, Mr. Jones, in his own words, made it abundantly clear that he automatically would refuse to recommend the death penalty, and thus his removal for cause was not in violation of Witherspoon, supra.

3. Sylvia Gaines

The Court is unable to find a scintilla of merit in the petitioner's claim that the removal of Sylvia Gaines was a violation of Witherspoon, supra:

MR. DUBITSKY: Assuming that you felt that the aggravating circumstances contemplated in the law were not outweighed by the mitigating circumstances in this case, would you be able to recommend the death penalty?

MS. GAINES: No.

MR. DUBITSKY: Are you saying that regardless of the evidence, regardless?

MS. GAINES: Regardless.

MR. DUBITSKY: No matter how heinious a crime it was you would not be able to recommend the death penalty?

MS. GAINES: No.

(R. 778-779).

4. Marilyn Campbell

In his assertions, the petitioner remarks that Ms. Campbell stated she "would not like to" give the death penalty (R. 1042) and refused to "promise" the prosecutor that she would consider all possible recommendations including that of the death penalty. (R. 1042). Such selective vision by the petitioner does not assist the Court especially in light of the question posed by Mr. Dean and response of Ms. Campbell after Mr. Dean explained Florida's bifurcated trial procedure:

MR. DEAN: Well, I can accept that fact. But, can you see any set of circumstances where you might vote, recommend the death penalty, reserving that you have reasons you would not like to do so in your own mind, foresee any set of circumstances that were so horrendous that you might vote, recommend the death penalty?

MS. CAMPBELL: No.

(R. 1045).

Clearly, when pressed by Mr. Dean to give the court as concrete an answer as possible, Ms. Campbell's response was such that her removal did not trigger a Witherspoon violation.

5. Betty Johnson

At voir dire, Mr. Dubitsky asked Ms. Johnson:

The jury, first, is given the question only of guilt or innocence of the charge. If,

in fact, they find that the defendant is guilty of first degree murder, then, they are given additional evidence as to whether there are aggravating or mitigating circumstances in the case and asked to make a recommendation by a majority vote. Now, would you be able to determine the first question, the one of guilt or innocence, without regard to your feelings?

MS. JOHNSON: Yes, I think so.

MR. DUBITSKY: Assuming that that first question had been reached, do I understand correctly that when it came time for the second vote, your vote would always be mercy regardless of what the facts were in the case?

MS. JOHNSON: Yes.

MR. DUBITSKY: Any circumstances where you would recommend the death penalty?

MS. JOHNSON: No, I don't think so.

(R. 1082-1083).

Ms. Johnson's final response, "No, I don't think so," is not unmistakably clear but, when it is considered with her other testimony, the clarity of her opinion is sufficient to dispel allegations of a Witherspoon violation.

6. Anna Brown

The testimony of Anna Brown is often garbled, non-committal at times and occasionally ambiguous. However, examination and evaluation of her entire testimony reveals no viable Witherspoon argument may be maintained by the petitioner. In pertinent part, Ms. Brown testified:

MR. DUBITSKY: All right.

The charge of first degree murder in Florida is potentially punishable by death. Do you have any religious, conscientious or moral objections to the imposition of the death penalty?

MS. BROWN: Yes.

MR. DUBITSKY: Are these of such a nature that you would be unable to vote guilty of the crime punishable by death?

MS. BROWN: Repeat that, please.

MR. DUBITSKY: Are those beliefs or feelings of yours of such a nature that they would prevent you from voting guilty?

MS. BROWN: Yes.

MR. DUBITSKY: In a case which might be punishable by death?

MS. BROWN: Yes.

MR. DUBITSKY: Are you saying that no matter how horrible or atrocious the crime is you would never recommend a death penalty in a case?

MS. BROWN: Well, that would depend on the circumstances. Perhaps I would say no and in the case I might say yes.

MR. DUBITSKY: Some circumstances where you could recommend the death penalty?

MS. BROWN: Yes.

MR. DUBITSKY: Okay.

But, basically, you are leaning against it; is that a fair statement?

MS. BROWN: Yes.

MR. DUBITSKY: Assuming that you were convinced beyond a reasonable doubt that the defendant in this particular case had committed first degree murder, would you then vote guilty of first degree murder even though you knew it might mean the death penalty for him?

MS. BROWN: Yes, I would say guilty.

MR. DUBITSKY: Would you consider if you are convinced that the jury was not going to, the other members of the jury were not going to recommend mercy, would you consider reducing your vote even though you were convinced

he is guilty of first degree murder and say second degree murder to avoid the death penalty?

MS. BROWN: Yes, I would.

MR. DUBITSKY: In other words, you could not assure me that you would vote guilty of first degree murder even though you were convinced that the defendant was guilty of first degree murder?

MS. BROWN: Well, I don't believe in the death penalty.

MR. DUBITSKY: What I am saying, there may be circumstances which would change your vote from guilty of first degree murder to guilty of some lesser offense to avoid the death penalty?

MS. BROWN: Right.

MR. DUBITSKY: Based on that, I move to excuse the juror for cause.

THE COURT: Any objection?

MR. DEAN: No, your Honor.

(R. 194-197).

Reading Ms. Brown's testimony as a whole, it does not appear to this Court that her removal was violative of the standards of Witherspoon, supra. Ms. Brown first stated that her beliefs would prevent her from voting the petitioner guilty of a crime punishable by death. She then hedged and stated that there might be some circumstances where she would find the defendant guilty of first degree murder and recommend the death penalty but, once faced with a decision at the penalty phase of the trial, she would change her vote from guilty of first degree murder to guilty of some lesser offense to avoid the death penalty if no other members of the jury were going to recommend mercy. Ms. Brown concluded her testimony with the flat statement that she didn't believe in the death penalty and therefore would

alter her vote to avoid that penalty. This testimony clearly evidences a juror who was predisposed before trial to reduce her vote to prevent imposition of the death penalty. It is clear that this venirewoman was not the impartial juror contemplated by the Constitution and by the Supreme Court in Witherspoon, supra at 596:

> The right under the Sixth and Fourteenth Amendments to trial by a jury guarantees to the criminally accused "a fair trial by a panel of impartial, 'indifferent' jurors." Irvin v. Dowd, supra, 366 U.S. at 722, 81 S.Ct. at 1642. Accord, e.g., Murphy v. Florida, 421 U.S. 794, 799, 95 S.Ct. 2031, 2036, 44 L.Ed.2d 589 (1975). But the state also enjoys the right to an impartial jury, Williams v. Wainwright, supra, 427 F.2d at 923, and impartiality requires not only freedom from jury bias against the accused and for the prosecution, but freedom from jury bias for the accused and against the prosecution. Hayes v. Missouri, 120 U.S. 68, 70-71, 7 S.Ct. 350, 351, 30 L.Ed. 578 (1887).

b. Denial of a trial by a jury of a representative cross-section of the community.

One right guaranteed to all persons by the sixth and fourteenth amendments is the right to a jury trial. This Court believes such a constitutionally foundationed right is fundamental. Further, statutes, rules of procedure, rules of evidence and case law have evolved in both state and federal legislative and judicial bodies to govern criminal proceedings and to ensure an individual a fair trial.

History reveals that jury systems existed in England before the Norman Conquest, and much of America's judicial system, including that of the petit and grand juries, is based on English common law. Earliest English records indicate that a jury system had been established by 997 A.D. during the reign of Ethelred

the Unready. The trial jury was fully functional by the early 1200's. The first petit juries were composed of 12 knights who were formally sworn to declare the truth between the parties. The petit jury system developed, and soon juries began to be composed of one's neighbors who had certain property qualifications "otherwise they shall not be sworn, lest through their hunger and proverty they may be easily corrupted or suborned." Fortescue, de Laudibus de Legum Anglie, CXXV at 59 (Chrimes ed. 1942).

King Henry II probably can be credited more than any other single individual with laying the foundation for the modern jury. He impaneled men to consider criminal cases and accuse those suspected of committing crimes. These procedures were formalized in 1166 at the Assize of Clarendon. T.F.L. Pluckett, A Concise History of the Common Law (5th ed. 1956). The jury was used erratically and was the Crown's prerogative until 1215, when a group of barons exacted from King John, in the Magna Carta, the promise:

> No free man shall be taken or imprisoned or [dispossessed] or outlawed or exiled or in any way destroyed...except by the lawful judgment of his peers and the law of the land.

17 John (Magna Carta) c.39 (1215); see Lloyd E. Moore, The Jury: Tool of King's, Palladium of Liberty (1973).

In Colonial America,

> [t]he independence of the jury from the crown was also an important aspect of the North American drive for independence from Britain in the eighteenth century. The people who settled in the original thirteen colonies considered jury trial a fundamental right, as indeed it had

> been in England for centuries. Most of the colonies specifically guaranteed trial by jury in their charters.

Francis H. Heller, The Sixth Amendment to the Constitution of the United States (1951).

When drawn, article III § 2 of the United States Constitution set forth that "the trial of all crimes except in cases of impeachment, shall be by jury; and such trials shall be held in the state where the said crimes shall have been committed." This inexact provision was perhaps one reason for opposition to the Constitution during its ratification period from 1787 - 1789 when many people expressed fears that the right to be tried by a jury of one's peers in one's own neighborhood was insufficiently protected.

Objections to the Constitution were met by the immediate submission and adoption of the Bill of Rights. The sixth amendment provided:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him, to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

Thereafter, the state constitutions of every state entering the Union protected, in one form or another, the right to jury trial in criminal cases.

Each time the question of right to trial by jury has arisen, it has been honed and its parameters further defined.

Guidelines have been set forth and standards adopted. One concept that has appeared consistently during these judicial efforts at definition is the need for jurors who will represent a cross section of the community. As early as 1942, the Supreme Court stated:

> The proper functioning of the jury system, and, indeed, our democracy itself, requires that the jury be a "body truly representative of the community" and not the organ of any special group or class...[Jury officials] must not allow the desire for competent jurors to lead them into selections which do not comport with the concept of the jury as a cross section of the community...If such practices are to be countenanced, the hard won right of trial by jury becomes a thing of doubtful value, lacking one of the essential characteristics that have made it a cherished feature of our institutions.

Glasser v. United States, 315 U.S. 60, 86 (1942).

Most recently, in the case of Spinkellink v. Wainwright, supra, the Fifth Circuit stated that the exclusion of veniremen persons properly removed under Witherspoon, supra, did not violate the representative cross-section requirements of the sixth and fourteenth amendments. See, Ballew v. Georgia, 435 U.S. 223 (1978); Carter v. Jury Commission of Greene County, 396 U.S. 320 (1970); Daniels v. Allen, 344 U.S. 443 (1953).

Clearly, in light of the legal authority examined by this Court and the facts within the record, the petitioner's claim must fail.

c. Cruel and unusual punishment.

In his memoranda, the petitioner has stated correctly the contemporary community values concepts established in Roberts v.

Louisiana, 428 U.S. 325, rehearing denied 429 U.S. 890 (1976); Woodsen v. North Carolina, 428 U.S. 280 (1976); Gregg v. Georgia, 428 U.S. 153 (1976) dissenting opinion 428 U.S. 227 (1976), rehearing denied 429 U.S. 874 (1976) and Proffitt v. Florida, supra, that the death penalty does not constitute cruel and unusual punishment if it is imposed pursuant to a properly drawn statute by a properly guided sentencing body. In the Spinkellink case, supra at 598, the Fifth Circuit addressed the same issues now raised where Mr. Spinkellink cited to the aforementioned legal authority and contended

> that the Court in those decisions "relied upon the notion that juries' reflections of enduring community attitudes in regard to the propriety of capital punishment would keep infliction of the death penalty in line with the enduring standards of decency which are the measure of the Eighth Amendment." Petitioner's Brief at 58-59. See Trop v. Dulles, 356 U.S. 86, 101, 78 S.Ct. 590, 598, 2 L.Ed.2d 630 (1958) (plurality opinion) ("The [Eighth] Amendment must draw its meaning from the evolving standards of decency that mark the progress of a maturing society.") According to Spenkelink, the exclusion of the two veniremen who were irrevocably against capital punishment under all circumstances resulted in the selection of a jury that did not reflect the full panoply of these "enduring community attitudes" about capital punishment, a deficiency that allegedly violates the Eighth Amendment's ban against cruel and unusual punishment as interpreted in Woodson, Roberts, and Gregg, as well as in Jurek and Proffitt. This is so, says the petitioner, even if the veniremen were properly excluded under the Witherspoon rationale.
>
> We have carefully reviewed the Supreme Court's pronouncements in all five of these decisions and

> find no support for the petitioner's contention.

In this case, as in that of Spinkellink, supra, the petitioner has failed to prove Witherspoon violations. As in the Spinkellink case, supra at 599,

> nowhere in the cited cases did the Court allude to the question of appropriate jury composition in the context of the Eighth and Fourteenth Amendments, much less address the specific contention raised here by the petitioner. In any event, as has already been demonstrated, the jury composition in the instant case was constitutional. Accordingly, the contention is without merit.

d. Absence of an impartial jury.

The petitioner asserts that even if the six venirepersons properly were excluded for cause under Witherspoon, their exclusion violated the petitioner's sixth and fourteenth amendment rights to trial by an impartial jury because "the exclusion of the [six] veniremen resulted in the selection of a 'death-qualified' jury that was 'prosecution-prone' with respect to the question of guilt or innocence." Spinkellink v. Wainwright, supra at 593. Like the Fifth Circuit in Spinkellink, id, this Court is unable to conclude, especially in light of the extensive record before the Court,

> or as a matter of judicial notice, that the exclusion of jurors opposed to capital punishment results in an unrepresentative jury on the issue of guilt or substantially increases the risk of conviction.

III. Improper Introduction of Evidence

The petitioner contends that the prosecutor knowingly, calculatedly and intentionally introduced testimony at trial

that the petitioner's accomplice, Reid McLaughlin, had taken a polygraph test before he was allowed to testify. The petitioner asserts that therefore he was denied his due process constitutional right to confront and cross-examine witnesses.

Mr. McLaughlin, originally named as a co-defendant with the petitioner, was charged with the first degree murder of Donald Schmidt. Subsequently, he pled nolo contendere to second degree murder and agreed to testify against the petitioner.

During trial, Mr. Dean asked Mr. McLaughlin on cross-examination:

> "Q. [defense counsel] Did anyone tell you that your sentence would depend on how your testimony turned out?
>
> A. Yes."
> (R. 1390).

Upon redirect examination, the witness was asked by the prosecutor:

> "Q. [the State] Now, sir, when you say that your sentence is going to be determined by your testimony is there any question in your mind what your sentence is going to be?
>
> A. No.
>
> Q. Has there been an agreement as to what your sentence is going to be?
>
> A. Yes.
>
> Q. What is that?
>
> A. Life."

* * * * *

> "Q. Now, Reid, I believe you just indicated that the sentence is going to be life.

A. Yes it is.

Q. Was there any agreement if you testified any particular way that you would get anything other than life?

A. No.

Q. When you said that your sentence is going to be determined by your testimony and would you explain to the jury what you meant?

A. That I would have to take a polygraph test and pass it." (R. 1392, 1393-1394).

Mr. Dean immediately moved for a mistrial, but his Motion was denied. (R. 1394-1397). However, Judge Cowart asked Mr. Dean whether the defense wanted the jury instructed to disregard the reference to the polygraph, and Mr. Dean declined the court's suggestion.

Mr. Dean renewed his Motion for a Mistrial the following morning. (R. 1421). At that time the prosecutor admitted that his "question was intended to elicit that answer" relative to the polygraph. (R. 1425). However, the prosecutor advised Judge Cowart that Mr. Dean had been informed previously of the terms of Mr. McLaughlin's plea bargain agreement and had been provided with a copy of the results of the polygraph examination. (R. 1426).

Judge Cowart denied the renewed Motion for a Mistrial and found that at the close of Mr. McLaughlin's cross-examination by Mr. Dean certain unexplained matters remained regarding the conditions of Mr. McLaughlin's sentence. Thus, Judge Cowart reasoned, redirect examination was proper on the point as was Mr. McLaughlin's response to the State's question. In light of all the facts presented to the jury, Judge Cowart found the mere reference to the polygraph examination, without more, was

harmless error. Further, Judge Cowart determined that, as the defense knew the terms of Mr. McLaughlin's plea and raised the question of his sentence on cross-examination, he "opened the door" to the possibility that the answer at issue might be elicited from Mr. McLaughlin. Judge Cowart then admonished both counsel, particularly the prosecutor, not to mention the polygraph examination during closing arguments, and counsel complied with his instruction. (R. 1523-1526). Judge Cowart also charged the jury on accomplice testimony:

> When two or more persons take part in commission of a crime each is an accomplice of all the others.
>
> The testimony of an accomplice must be received with great caution and carefully and closely examined by you before a conviction is based upon it. This is particularly true when there is neither direct testimony nor circumstances tending to corroborate the testimony of the accomplice. However, the testimony of a accomplice, even though uncorroborated, is sufficient upon which to base a conviction if you are convinced by it of the defendant's guilt beyond a reasonable doubt.

(R. 1592).

Under Florida legal authority evidence of or allusion to the results of a polygraph examination are inadmissible and improper. Sullivan v. State, 303 So.2d 632 (Fla. 1974); Anderson v. State, 241 So.2d 390 (Fla. 1970); Kaminski v. State, 63 So.2d 339 (Fla. 1953); Dean v. State, 325 So.2d 14 (Fla. 1st DCA 1975); Crawford v. State, 321 So.2d 559 (Fla. 4th DCA 1975). Mere reference to the existence or absence of a polygraph examination does not cause the same result.

In the case at bar, the defense opened the door, and the prosecutor deliberately walked through and elicited the reference to the taking of the polygraph examination. However, nothing was said of the result of that test, both the question and answer were couched in the future tense, and the response was most ambiguous. Mr. McLaughlin did not say that he had taken the test or that he had passed it, and despite the defense's awareness of the results of the test, no reference was made to these results at any time. This Court fails to find sufficient prejudice to the petitioner resulting from this testimony to reach constitutional proportions.

The petitioner's assertion is unfounded that he was denied his right to confront and cross-examine Mr. McLaughlin. During cross-examination, Mr. Dean attempted to impeach the witness and vigorously tried to cast doubt on his credibility. (R. 1382-1391). Mr. Dean apparently utilized his knowledge of the witness' plea agreement and polygraph in an unsuccessful attempt to discredit Mr. McLaughlin. The State countered these efforts by walking through the door opened by the defense and trying to rehabilitate its witness on the matter of the plea agreement left unsettled by Mr. Dean at the close of his cross-examination.

This Court has considered and approves Justice Ben Overton's special concurring opinion in Sullivan v. State, 303 So.2d 632, 636-637 (Fla. 1974):

> I agree that the conduct of the trial prosecutor in purposely attempting to elicit from the accomplice-witness a reference to the polygraph test must be sharply condemned. This type of prosecutorial behavior cannot only bring about a mistrial; it can cause the loss of the entire case as well. Such is

the import of United States v. Jorn, 400 U.S. 470, 91 S.Ct. 517, 27 L.Ed.2d 543 (1971), where both the plurality and dissenting opinions suggest that the Fifth Amendment's Double Jeopardy Clause would apply to bar the reprosecution of a defendant whose mistrial is occasioned by prosecutorial overreaching.

The Jorn decision is qualified in Illinois v. Somerville, but this latter decision still condemns prosecutorial manipulation.

The petitioner cites to this Court cases which he contends support his position that he State's misconduct on redirect examination requires a reversal of the petitioner's conviction. Donnelly v. DeChristoforo, 416 U.S. 637 (1974); Miller v. Pate, 386 U.S. 1 (1967); Hysler v. Florida, 315 U.S. 411 (1942). However, careful analysis of each of these cases reveals they refer to evidence and testimony elicited by the prosecutor and known by him to be erroneous, misrepresentative, perjured or obtained through violence or torture. As such, these cases clearly are distinguishable from the matter before this Court and are inapplicable to an issue involving the solitary mention of a plea dependent upon the taking of a polygraph examination.

Even if the Court views the admission of this testimony as error, not every error is harmful or warrants a reversal of the petitioner's conviction. Chapman v. California, 386 U.S. 18, rehearing denied 386 U.S. 987 (1967); Harryman v. Estelle, 597 F.2d 927 (5th Cir. 1979); following remand 616 F.2d 870 (5th Cir. 1980). Clearly, the State has the burden of proving that the error complained of did not influence the fact finder's deliberations. Harrington v. California, 395 U.S. 250 (1969).

A constitutional error is harmless, if there is no "reasonable

> possibility that the evidence complained of might have contributed to the conviction." Fahy v. Connecticut, 375 U.S. 85, 86-87, 84 S.Ct. 229, 230, 11 L.Ed.2d 171 (1963). The test is not "whether there was sufficient evidence on which the petitioner could have been convicted without the evidence complained of," id., but whether the evidence complained of may have influenced the fact-finder's deliberations, see Harrington v. California, 395 U.S. 250, 254, 89 S.Ct. 1726, 23 L.Ed.2d 284 (1969).

597 F.2d at 929.

In considering the error and the State's burden of proof, the Court must look to the totality of the facts presented. Fahy v. Connecticut, 375 U.S. 85 (1963); Harryman v. Estelle, supra. While the petitioner's testimony at trial was entirely contrary to that of Mr. McLaughlin, the evidence presented by the State through witnesses, physical evidence and the petitioner's confession was clear and convincing and left no doubt of the petitioner's guilt. The petitioner's confession, corroborated without significant deviation by Mr. McLaughlin, evidence of the petitioner's possession of the victim's watch, his possession and use of the victim's credit cards and the shotgun, pistol and tape like that used to bind the victim's hands which were found in the petitioner's automobile all were overwhelming evidence of the petitioner's guilt. In light of the sufficiency of this evidence of the petitioner's guilt, the mere mention of the requirement of a polygraph examination, if error at all, was harmless error. Schneble v. Florida, 405 U.S. 427 (1972); Harrington v. California, supra; Harryman v. Estelle, supra; Chapman v. United States, supra; Zilka v. Estelle, 529 F.2d 388 (5th Cir. 1976); Williams v. Henderson, 451 F.Supp.

328 (E.D.N.Y. 1978); Sullivan v. State, supra. Clearly, the petitioner's assertions are without factual substance or legal merit.

IV. Denial of Cross-examination

The petitioner alleges that his right to cross-examine witnesses guaranteed by the fourteenth amendment was abridged by the trial judge when he ruled that Mr. Dean could not impeach the witness, Frank Barden, based upon Mr. Barden's recent conviction for grand larceny where adjudication was withheld on the conviction. The petitioner contends that his counsel, Mr. Dean, made this assessment of the impeachment situation. However, the record reveals that Mr. Dean's cross-examination and impeachment of Mr. Barden was limited by Judge Cowart who refused to permit Mr. Dean to go forward with questioning. (R. 1208).

As this issue was not raised on appeal, the petitioner's request for relief ordinarily would be precluded. Wainwright v. Sykes, 433 U.S. 72, rehearing denied 434 U.S. 880 (1977). However, owing to the petitioner's ineffective assistance of counsel claim, this Court must examine the charge on its merits.

The Florida Evidence Code recognizes that "convictions" of certain crimes may be used to discredit a witness. Section 90.610 of the Florida Statutes states:

> A party may attack the credibility of any witness, including an accused, by evidence that the witness has been convicted of a crime if the crime was punishable by death or imprisonment in excess of 1 year under the law under which he was convicted, or if the crime involved dishonestly or a false statement regardless of the punishment.

The remainder of the statute presents several exceptions. The previous law on this subject, Florida Statutes § 90.08 contained a broader definition of conviction:

> No person shall be disqualified to testify as a witness in any court of this state by reason of conviction of any crime except perjury, but his testimony shall be received in evidence under the rules, as any other testimony; provided, however, evidence of such conviction may be given to affect the credibility of the said witness, and that such conviction may be proved by questioning the proposed witness, or, if he deny it, by producing a record of his conviction. Testimony of the general reputation of said witness may likewise be given in evidence to affect his credibility.

The cases interpreting these statutes do not define "conviction" to include a conviction upon which adjudication was withheld. However, witnesses may be impeached by prior finalized convictions, including instances where convictions were pending appeal and convictions upon which the sentence was suspended. Fulton v. State, 335 So.2d 280 (Fla. 1976); Brantley v. State, 279 So.2d 290 (Fla. 1973); McArthur v. Cook, 99 So.2d 565 (Fla. 1957). See, United States v. Collins, 552 F.2d 243 (8th Cir. 1977). On the other hand, a witness may not be impeached by pending charges, juvenile proceedings adjudicating the witness delinquent or evidence of acts of misconduct. Fulton v. State, supra; Crespo v. State, 344 So.2d 598 (Fla. 3rd DCA 1977).

In the instant case, the trial court ruled that the witness could not be impeached by a prior conviction upon which adjudication was withheld. (R. 1209). Prior decisions had not treated instances with adjudication withheld as judgments of conviction for impeachment purposes. In different circumstances, one district court treated a conviction with adjudication with-

held as a conviction for purposes of subsequent punishments when sentencing on a second conviction. Maxwell v. State, 336 So. 2d 658 (Fla. 2d DCA 1976).

In the case at bar, the trial judge clearly was in the best position to weigh the probative value of such an inquiry into the witness' criminal background against possible prejudice by the jury toward the witness or to the petitioner. It was Judge Cowart who heard counsel's proffer of the witness' criminal background, his conviction, his plea bargain and his agreements with the State. Judge Cowart then concluded that the witness' conviction with adjudication withheld did not affect the credibility of the witness in the limited scope of his testimony. The action taken by the trial court was within its discretion to limit the scope and extent of cross-examination, and an appellate court will not interfere with the ruling unless it is clearly erroneous and constitutes an abuse of discretion. United States v. Crumley, 565 F.2d 945 (5th Cir. 1978).

This Court recognizes that the right of judicial discretion must respect and may not thwart a defendant's right to confrontation and due process guaranteed by the sixth and fourteenth amendments. However, this Court finds no abuse in Judge Cowart's exercise of discretion as his decision was predicated upon Florida statutory authority and its evidence code. Further it appears that, by this application of Florida law, the petitioner's ability to cross-examine the witness was not restricted unduly in light of the nature and scope of Mr. Barden's testimony. Cf. United States v. Crumley, supra; Passmore v. Estelle, supra. It further appears from the record that the petitioner's cross-examination of Mr. Barden was detailed and thorough and was limited only insofar as he was denied impeachment upon the prior conviction.

However, assuming Judge Cowart was in error in his ruling, the error was harmless. The crux of the issue is whether the jury was able to make a reasoned analysis of Mr. Barden's credibility. Thus, it is necessary to examine the nature of the impeachment denied to the petitioner. Clearly, denial of impeachment directed primarily toward whether a witness does not always tell the truth is not the critical due process denial of impeachment aimed at showing the jury the witness' bias, prejudice to the defendant or other ulterior motive as examined in Davis v. Alaska, 415 U.S. 308 (1974). In the case of Cloud v. Thomas, 627 F.2d 742, 744 (5th Cir. 1980), Judge Alvin B. Rubin said:

> While the Federal Rules of Evidence permit a criminal defendant, at the discretion of the court, to impeach the credibility of a hostile witness with evidence of prior instances of dishonesty (see Fed.R.Evid. 608), we find no authority for the proposition that a defendant has a constitutional right to attempt such impeachment. In Davis v. Alaska, supra, the Supreme Court found a sixth amendment violation in a state judge's refusal to permit cross-examination into the partiality of a key prosecution witness. The witness had been adjudicated a juvenile delinquent; his probationary status at the time of Davis' trial might have motivated the witness to identify Davis as the culprit in order to shift suspicion from himself and prevent possible revocation of probation. Noting that "the exposure of a witness' motivation in testifying is a proper and important function of the constitutionally protected right of cross-examination," Id. at 415 U.S. at 316, 94 S.Ct. 1110, 39 L.Ed.2d at 354, the Court held that prohibiting an exploration into a witness's possible reasons for falsifying

> testimony was an error "of the first magnitude and no amount of showing of want of prejudice would cure it." Id. at 415 U.S. at 318, 94 S.Ct. 1111, 39 L.Ed.2d at 355.
>
> Under Davis, cross-examination must be permitted into any incentive the witness may have to falsify his testimony. Here, the petitioner has failed to advance such an incentive. Instead, the petitioner argues that the fact that the witness lied before may be introduced to show that the witness is lying now. While Davis mentions the traditional importance of allowing the cross-examiner to discredit a hostile witness, Id. at 415 U.S. at 316, 94 S.Ct. 1110, 39 L.Ed.2d 354, it nowhere holds that the sixth amendment requires the admission of all character evidence of whatever relevance and probative value.

Judge Rubin also pointed out that "there is a difference between general credibility and answers which might possibly establish untruthfulness with respect to the specific events of the crime charged." Id at 745. In the Cloud case, id, as in the case now before this Court,

> [w]hen the evidence excluded is of such inherently limited prohibition, the sixth amendment is not violated by failure to admit it. While this testimony might nonetheless have been helpful to the jury, we cannot hold that the sixth amendment is coextensive with the Federal Rules of Evidence or that it terminates the discretion of a state judge to decide on the desireability of admitting such testimony into evidence.

Clearly, the trial court's error, if error at all, was harmless especially in light of the record that Mr. Barden was not a key witness against the petitioner and other witnesses testified to the critical facts in the case and provided the jury with

ample evidence to support their finding of guilt.

V. Self-representation

The petitioner contends that he was denied his right of self-representation guaranteed by the sixth and fourteenth amendments. In support of this allegation, the petitioner submitted to the trial court a written motion filed pro se on November 2, 1973 wherein he requested the trial judge to permit him to examine certain state witnesses. The petitioner's motion stated:

> The main purpose of this motion is simply to have the chance if needed or necessary to be able to get the truth and there may come opportunities that the defendant himself would be best able to probe into specific areas defendant feels necessary to be brought out in court....(T)here is no one who knows better than I certain facts of this case and defendant feels there is no one who could bring these facts out better than he.

Judge Cowart denied the motion. (R. 768).

Although this issue was not raised on direct appeal and may have been waived, Wainwright v. Sykes, supra, the Court will review the allegation in order to clarify the petitioner's view of his rights under Faretta v. California, 422 U.S. 806 (1975). The Supreme Court once determined that a defendant has a right to self-representation as well as a right to receive assistance from counsel. See, Powell v. Alabama, 287 U.S. 45 (1932). However, subsequent legal decisions limited that right and declared that a defendant does not have the right to "hybrid" representation, i.e., representation jointly with an attorney. United States v. Daniels, 572 F.2d 535 (5th Cir. 1978); United States v. Bowdach, 561 F.2d 1160 (5th Cir. 1977); United States

v. Shea, 508 F.2d 82 (5th Cir. 1975).

In the Daniels case, supra at 540, the Fifth Circuit stated that "unless an attorney's actions effectively deny the defendant his sixth amendment right to the assistance of counsel, the defendant is bound by his attorney's decisions at trial." At this juncture, this Court marks that it has already determined that the petitioner received effective assistance of counsel from both Mr. Windsor and Mr. Dean. Further, the record confirms that the petitioner assisted his counsel in trial preparation, assisted in the preparation of questions to be asked of each venireperson and witness (TH. 274, 322, 325, 327), conferred with his counsel at every crucial stage of the testimony given (TH. 307) and either attended redepositions or had available to him copies of transcripts of pretrial hearings, depositions and redepositions which would enable him to assist his counsel. (TH. 322). In fact, the entire record before this Court reveals that the petitioner not only was provided great opportunity to assist his counsel but also was very active in assisting his counsel throughout the various stages of the proceedings. Thus, this Court rejects the petitioner's arguments as being without factual or legal support.

VI. Improper Prosecutorial Comment

The petitioner contends that allegedly improper prosecutorial argument at the sentencing phase of his trial denied the petitioner his right to due process of the law. He alleges specifically that improper prosecutorial argument deprived him of his rights to a fair trial, to equal protection of the law, and to freedom from cruel and unusual punishment as guaranteed by the eighth and fourteenth amendments to the Constitution and Article I §§ 2, 9, 16 and 17 of the Florida Constitution.

Although consideration of prosecutorial comment is generally barred from review upon failure to raise the issue on direct appeal, Wainwright v. Sykes, supra, in light of the petitioner's claim of ineffective assistance of counsel, this Court must give close scrutiny to the petitioner's allegations of prejudicial violations committed during the penalty phase of his trial. Concomitantly, to effectuate a proper determintion for federal habeas corpus relief when the point at issue turns upon whether a state prosecutor's argument violated limits of permissible conduct such as to give rise to a due process claim, both state and federal standards governing prosecutorial argument will be examined for guidance. Houston v. Estelle, supra.

The law of this nation relative to prosecutorial comment is replete with adomonition directed at the potential prejudicial effect inherent in a prosecutor's remarks to a jury. Griffin v. California, 380 U.S. 609, rehearing denied 381 U.S. 957 (1965); Lawn v. United States, 355 U.S. 339, rehearing denied 355 U.S. 967 (1958); Berger v. United States, 295 U.S. 78 (1935); United States v. Morris, 568 F.2d 396 (5th Cir. 1978); United States v. Wayman, 510 F.2d 1020 (5th Cir. 1975); Hall v. United States, 419 F.2d 582 (5th Cir. 1969). Unquestionably, when an attorney occupies a public position of trust and integrity such as that of state prosecutor, he is faced with the challenge of a dual obligation--zealous prosecution of the case, yet due regard for fairness and the rights of the accused. United States v. Morris, supra.

The applicable test in considering the possible impropriety of prosecutorial comments has been enunciated repeatedly by reviewing courts: the comments must be taken as a whole and in the context of the entire case in order to determine whether the prosecutor's argument or conduct prejudically affected the sub-

stantial rights of the defendant. Berger v. United States, supra. Each case must be considered upon its own merits and within the circumstances pertaining when the questionable statements are made, and, if there is ample basis in the record to support the remarks, a conviction will be affirmed. Collins v. State, 180 So.2d 340 (Fla. 1965).

The issue now before this Court arose during the sentencing phase of the petitioner's trial. The jury previously had weighed the overwhelming evidence of guilt, including the petitioner's own testimony as well as that of an accomplice to the murder, and had adjudged the petitioner guilty of murder in the first degree. The petitioner alleges that during the sentencing hearing, while the jury sat under obligation to consider imposition of the death penalty, the procedure was infected by inflammatory and prejudicial argument of constitutional magnitude. The prosecutor is charged with error in three particular instances:

(1) accusing the petitioner of a lack of remorse (when this is not a statutory aggravating circumstance) (R. 1674-75);

(2) alleging that the petitioner had committed perjury (R. 1674-75); and

(3) expressing his personal opinion as to the desirability of the death sentence (R. 1664-1665, 1677).

The prosecutorial comment pertinent to the first and second allegation, and, according to the petitioner, the most damning portion of the argument, occurred as follows:

> MR. DUBITSKY: You saw how much of a candidate for rehabilitation he was yesterday when he comes into this court and he doesn't show any remorse and says, "I did it, I am sorry, it was a tragic mistake," or something like that. But, he compounds his crime by trying to lie about it and laying the blame on some under--

MR. DEAN: Objection to that, your Honor, improper comment.

THE COURT: I will sustain it. I will ask the jury to disregard that comment. You may proceed.

MR. DUBITSKY: By your verdict, you found the defendant not telling the truth when he came in here yesterday. By your verdict, you chose to reject his testimony and, that means that you believe that he perjured himself on the stand. And, I--

MR. DEAN: Objection to that, your Honor, that is improper.

THE COURT: I will instruct the jury to what they can consider. You may go ahead.

MR. DUBITSKY: I ask is that a sign of rehabilitation? Is that a sign of repent? Is this in any way mitigating factor to be considered by you in this crime? (R. 1674-1975).

The petitioner's argument that the prosecutor urged the jury to consider the petitioner's lack of remorse as an aggravating circumstance is clearly without merit. Upon careful examination of the record, this Court finds that the prosecutor was merely expressing his view of the limitations which they could accord mitigating circumstances presented to them. In the case of Washington v. State, 362 So.2d 658 (Fla. 1978) the Court proposed that any mitigating circumstances which can be raised certainly can be negated also.

This comment cannot be considered of such prejudicial nature as to merit reversal. Both federal and Florida state courts have taken the opportunity to review comments analogous to these now before the Court. In Bishop v. Wainwright, 511 F.2d 664, 668 (5th Cir. 1975), the Court examined a similar reference to a defendant's lack of remorse.

> The defense asked you why
> didn't this boy bury these bodies.
> If he killed them, why did he do

> things that would make it obvious he was the one that did it? Why didn't he just bury the bodies? I think I have an answer for you: no one would have known about it, that's why. This boy wants notoriety; he wants to play games, just like he did the night he gave the statement. Tempt you a little bit, holds the carrot. If no one knew about it, it wouldn't mean anything. Sylvian Bishop wouldn't be on the front page of the paper or in this courtroom. Look at his attitude during the week. Have you seen one little ounce of remorse on his face, one outburst, one apparent showing of concern? He's sat there like a knot on a log through the whole trial. He didn't talk to his lawyer, hasn't said anything. He just sits there. He doesn't do anything. Absolutely nothing.

Again, in Borodine v. Douzanis, 455 F.Supp. 1022, 1029 (D. Mass. 1978), the Court considered the prosecutor's closing remark and its prejudicial impact upon the jury:

> I shall respectfully submit to you, ladies and gentlemen of the jury, that this man, Michael Borodine, who you saw through the course of this trial just sit there. He's as calm as he can be, he never has had [sic] a shred of remorse from the beginning right up until now.

In both instances, the Courts did not find these remarks, though admittedly improper, to be of such proportion as to amount to reversible error.

The Florida Supreme Court also has reached the same conclusion in considering an appeal from a death sentence. Although a comment made by the prosecutor as to the defendant's chance for rehabilitation was found distasteful, the Florida Supreme Court found no basis for reversible error. Proffitt v. State, 315 So.2d 461 (Fla. 1975).

Thus, in looking both to the relevant law and to the weight of evidence on record in the petitioner's case, this Court finds no merit to the petitioner's first allegation.

The petitioner further asserts prejudicial effect rising from the prosecutor's accusations that the petitioner had lied while on the stand (R. 1674-1675). This Court does not condone such action by a prosecutor. Nonetheless, such an implication does not mandate reversible error. In United States v. Risi, 603 F.2d 1193, 1196 (5th Cir. 1979), the Court considered a comment by the prosecutrix that she knew the defendant was a perjurer and any further questioning would elicit only more perjury:

> As a general rule, neither the prosecutor nor the defense counsel may express an opinion of a witness's credibility. United States v. Morris, 568 F.2d 396, 402 (5th Cir. 1978); Hall v. United States, 419 F.2d 582, 587 (5th Cir. 1969). However, there is a distinction between an argument which suggests a personal belief and private information and an argument which merely intends to show the witness's testimony is not supported, but rather is contradicted, by the other evidence.

In the case of United States v. Siegel, 587 F.2d 721, 727 (5th Cir. 1979), the Fifth Circuit reviewed the petitioner's allegation of prejudicial misconduct present in the prosecutor's statement that the petitioner had lied as well as various other allegations of prejudicial prosecutorial comment and said:

> Although we would in no way condone the actions of a prosecutor stating that appellant in his opinion had lied we believe this prosecutor merely intended to argue that appellant's statements were not supported by the evidence. There was no inference that the

> prosecutor had private information supporting his belief that appellant had lied and no suggestion was made by the prosecutor that he had such private information.
>
> Furthermore, even if the prosecutor's statements could have been characterized as error, they would not have amounted to reversible error. "Error must be regarded as harmless if, upon an examination of the entire record, substantial prejudice to the defendant does not appear." United States v. Morris, 568 F.2d at 402, citing Berger v. United States, 295 U.S. 78, 82, 55 S.Ct. 629, 79 L.Ed. 1314 (1935).

In the case before the Court, the jury previously had determined the petitioner's guilt. Although this Court does not approve of the prosecutor's remark, it appears to exist merely as a suggestion that the jury should or perhaps did draw the conclusion from the evidence presented that the petitioner had not been completely honest. Since there was no implication that the prosecutor had private information supporting his disbelief, and in light of the overwhelming evidence of guilt, as well as the trial court's admonition that comments of the attorneys were not to be construed as evidence, this Court finds no "substantial prejudice" to the petitioner and concludes that the comment should not be deemed to be reversible error.

The final point raised by the petitioner on this issue concerns the propriety of the prosecutor's expression of personal opinion regarding the desirability of the death sentence:

> It is particularly difficult for me to sit here and tell you that I feel in this case that the death penalty is the appropriate penalty because you also have personal feelings, as I am sure each of you do on the death penalty and it is not something that I lightly do. Nevertheless, it is my responsibility and under the law it is my feeling that there are aggravating circumstances present as

they are defined by the statutes. I feel that under the laws as the Judge gives them to you it is your duty to find that those aggravating circumstances are present.

You have listened to the evidence, both the guilt or innocence portion of the trial and today, it is my belief there has not been evidence mitigating the circumstances as the Judge will instruct you, mitigating circumstances should be such as would outweigh the aggravating circumstances in this case. Therefore, it is my belief that it is my responsibility to request of you that your recommendation be in this case one of death rather than of mercy.

Likewise, I feel that it is your responsibility to make that recommendation as unpleasant as it is.

As I tell you, it is not a pleasant thing, not for me and not for you as I am sure, nor would it be for the Judge if he felt ultimately he had to make that determination. But, it is one which each of you and I agreed to shoulder when we accepted our respective positions in this trial. And, it is one which examining the testimony, I think that the evidence bears out very abundantly the Judge in his earlier instructions listed a number of factors which under the law are considered aggravating factors. ...

As I say, it is as unpleasant for me to ask it as it is unpleasant for you to do it. But, we are responsible for our respective positions. Therefore, the State does ask that you recommend the death penalty in this case.

(R. 1664-1665, 1677).

Clearly, a prosecutor should not express his personal opinion on the guilt of a defendant based upon facts not in evidence. However, the law of this Circuit has not found it to be reversible error for a prosecutor to express his opinion when it is based solely upon evidence adduced at trial. United States v. Wayman, supra; Thompson v. United States, 272 F.2d 919 (5th Cir. 1959). When, as in this case, the language of the prosecutor is considered

in full context, it appears not to be an exposition of personal opinion irrespective of the evidence, but rather his permissible conclusion or deduction on the sufficiency of the evidence establishing the petitioner's guilt. "It was a fair comment made in the discharge of the function of his office." Coleman v. State, 215 So.2d 96, 98 (Fla. 4th DCA 1968). As noted by the Wayman Court, supra, at 1028, "[t]he time has not yet come when a prosecuting attorney cannot argue the strength of his case - the weight and sufficiency of the evidence - and ask the jury for a conviction."

The record in the case at bar reveals that defense counsel made some efforts to object to the prosecutor's comments on the death penalty. It is, of course, true that counsel's failure to object is not dispositive "especially since objection cannot always procure realistic cure for damage." United States v. Young, 463 F.2d 934, 940 (D.C. Cir. 1972). However, the absence of defense counsel's objections may illustrate, in part, the absence of prejudicial impropriety inherent in the prosecutor's request for the death penalty. Reviewing again the trial in its entirety, as well as the sufficiency of the evidence compounded with the nature of the crime, this Court finds no prejudicial effect on the substantial rights of the petitioner resulting from the prosecutor's comments urging the death sentence.

The Court recognizes the potential for undue influence resulting from the prominent position taken by the state prosecutor in a murder trial. However, the jury in the instant case was not exposed to persistent or flagrant transgressions made during a "close case" supported by weak evidence. Rather, the facts of this case demand acknowledgment such as that delivered in Spencer v. State, 133 So.2d 729, 731 (Fla. 1961): "In actuality, there is probably very little that the prosecutors themselves could have advanced which would have been any more damning to the condition of this defendant than the gruesome evidence presented

from the witness stand."

In light of the record in this case and the relevant law pursuant to prosecutorial comment, this Court finds no basis for the petitioner's assertions of improper prosecutorial argument resulting in a denial of due process.

VII. Arbitrary Sentence

The petitioner asserts he was sentenced to the death penalty arbitrarily and in violation of the precepts of the eighth and fourteen amendments and Article I, §§ 2, 9 and 17 of the Florida Constitution.

In light of the case of Proffitt v. Florida, supra, upholding the constitutionality of Florida Statute § 921.141, the petitioner's contentions are without merit. In assessing the petitioner's claims, the Fifth Circuit has directed this Court to deterime whether the Florida courts, in this case, followed § 921.141 in imposing the death penalty on the petitioner. This Court is directed not to compare the petitioner's case with other Florida death penalty cases but must restrict itself to a statutory analysis of the issue. Spinkellink v. Wainwright, supra.

In the Spinkellink case, supra at 604-605, the Fifth Circuit said:

> It was not necessary for the district court to undertake such a case-by-case comparison. This conclusion rests upon which we believe the Supreme Court meant in Proffitt when it found Section 921.141 constitutional "on its face." ...[otherwise] [t]he federal courts then would be compelled continuously to question every substantive decision of the Florida criminal justice system with regard to the imposition of the death penalty. The intrusion would not be limited to the Florida Supreme Court. It would be necessary also, in order to review properly the Florida Supreme Court's decisions, to review the determinations of

> the trial courts. And in order to review properly those determinations, a careful examination of every trial record would be in order. A thorough review would necessitate looking behind the decisions of jurors and prosecutors, as well. Additionally, unsuccessful litigants could, before their sentences were carried out, challenge their sentences again and again as each later-convicted murderer was given life imprisonment, because the circumstances of each additional defendant so sentenced would become additional factors to be considered. The process would be never-ending and the benchmark for comparison would be chronically undefined. Further, there is no reason to believe that the federal judiciary can render better justice. As the Florida Supreme Court itself so candidly admits, see Provence v. State, supra, 337 So.2d at 787, reasonable persons can differ over the fate of every criminal defendant in every death penalty case. If the federal courts retried again and again the aggravating and mitigating circumstances in each of these cases, we may at times reach results different from those reached in the Florida state courts, but our conclusions would be no more, nor no less, accurate.

The Court has considered and rejected the merits of the petitioner's aggravating versus mitigating circumstances in points I, supra and VIII, infra, of its recommendation. Its inquiry is now limited to whether the trial court followed statutory requirements.

Florida Statute § 921.141 compels the trial court to find sufficient statutorily defined aggravating circumstances which outweigh mitigating circumstances before it can impose the death penalty. Despite one erroneous finding of aggravating circumstances, the trial court properly weighed the circumstances and justified its imposition of the death penalty. Brown v. State, 381 So.2d 690 (Fla. 1980); State v. Dixon, 283 So.2d 1 (Fla. 1973). The petitioner's sentence was supported by the record and the trial

court's findings. See, Hardgrave v. State, 366 So.2d 1 (Fla.) cert. denied ___ U.S. ___, 100 S.Ct. 239 (1979), rehearing denied 444 U.S. 985 (1980).

A careful examination of the petitioner's claim convinces this Court that the trial judge weighed the aggravating and mitigating circumstances, followed the statute, reached his decision according to the applicable facts and law and exercised his judicial discretion to impose the death penalty without abusing that discretion.

VIII. Jury Instructions

The petitioner alleges that he was denied due process at the penalty phase of the trial in that the trial judge instructed the jury that the petitioner had the burden of proving any mitigating circumstances. The petitioner also contends the trial judge improperly limited mitigating circumstances which could be considered by the jury.

These matters were not raised specifically on appeal and ordinarily could not be considered by the federal courts. Wainwright v. Sykes, supra. However, as these matters now are raised in conjunction with and as a part of the petitioner's allegations of ineffective assistance of counsel, they may be considered by this Court.

Due process and the rules governing the burden of proof of the prosecution at trial require that the government prove each and every element of the crime with which the defendant is charged, and such proof must be beyond a reasonable doubt. In re: Winship, 397 U.S. 358 (1970). Any shift of the prosecution's burden onto the shoulders of the defendant renders the trial fundamentally unfair. Id.

To assure the defendant charged with a capital felony a fair trial, the guilt or innocence phase of the trial is bifurcated

from the penalty phase. Florida Statutes § 921.141.

The record is clear that the prosecution undertook its requisite burden and carried that burden during the guilt or innocence phase of the petitioner's trial. At the conclusion of this phase, the jury returned guilty verdicts on the charges. Subsequently, the jury was reconvened to hear matters pertaining to the penalty to be imposed on the petitioner. At the time of this phase of trial, Florida statutory authority permitted the presentation of "circumstances surrounding the crime ..., the defendant's background ... and any facts in aggravation or mitigation; including, but not limited to, ..."

(3) Aggravating circumstances.

(a) The capital felony was committed by a convict under sentence of imprisonment.

(b) The defendant was previously convicted of another capital felony or of a felony involving the use or threat of violence to the person.

(c) At the time the capital felony was committed the defendant also committed another capital felony.

(d) The defendant knowingly created a great risk of death to many persons.

(e) The capital felony was committed while the defendant was engaged, or was an accomplice, in the commission of, or an attempt to commit, or flight after committing or attempting to commit, any robbery, rape, arson, burglary or kidnapping.

(f) The capital felony was committed for the purpose of avoiding or preventing a lawful arrest or effecting an escape from custody.

(g) The capital felony was committed for pecuniary gain.

(h) The capital felony was especially heinous, atrocious, or cruel, manifesting exceptional depravity.

(4) Mitigating circumstances.

(a) The defendant has no significant history of prior criminal activity.

(b) The capital felony was committed while the defendant was under the influence of extreme mental or emotional disturbance.

(c) The victim was a participant in the defendant's conduct or consented to the act.

(d) The capital felony was committed under circumstances which the defendant believed to provide a moral justification or extenuation for his conduct.

(e) The defendant was an accomplice in the capital felony committed by another person and his participation was relatively minor.

(f) The defendant acted under duress or under the domination of another person.

(g) At the time of the capital felony the capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was impaired as a result of mental disease or intoxication.

(h) The youth of the defendant at the time of the crime.

Florida Statues 921.141(b)(c).

The petitioner argues that before the presentation of testimony, Judge Cowart improperly directed the jury that:

> The mitigating circumstances which you must consider if established by the defendant are these. (R. 1627).

In his claim, the petitioner seems to be viewing the charge with tunnel-vision. This Court does not find Judge Cowart's instruction to be improper. See, Spinkellink v. Wainwright, supra at 621. Clearly, the court must view the trial court's instructions as a whole. Cupp v. Naughten, 414 U.S. 141 (1973);

United States v. Brooks, 611 F.2d 614 (5th cir. 1980). "Only when the charge taken in its entirety fails to fairly present the issues to the jury will error be found." Stephens v. Zant, 631 F.2d 397, 401 (5th Cir. 1980); United States v. Chandler, 586 F.2d 593, 606 (5th Cir. 1978), cert. denied 440 U.S. 927 (1979). This Court has not previously and will not now examine Judge Cowart's instruction in a vacuum. The pertinent set of instructions set forth:

> During the hearing you will receive evidence and testimony concerning certain aggravating and mitigating circumstances and all other matters that the Court deems relative to sentencing.
>
> Following the presentation of the testimony, the attorneys will be permitted to address arguments to you on the penalty aspect of this case.
>
> And, then, you will retire to consider rendering to this Court an advisory sentence based upon your determination as to whether sufficient aggravating circumstances exist to justify the imposition of the death penalty or whether sufficient mitigating circumstances exist to outweigh the aggravating circumstances found to exist.
>
> Your verdict should be based upon the evidence which you have heard while trying the guilt or innocence of the defendant and the evidence which will be presented to you in these proceedings....
>
> If you do not find that there existed any of the aggravating circumstances which have been described to you, it would be best, your duty to recommend a sentence of life imprisonment.
>
> Should you find one or more of these aggravating circumstances to exist, it would then be your duty to determine whether or not sufficient mitigating circumstances exist to outweigh the aggravating circumstances found to exist.
>
> The mitigating circumstances which you must consider if established by the defendant are these.

> One, that the defendant had no significant history of prior criminal activity.
>
> Two, that the crime for which the defendant is to be sentenced was committed while the defendant was under the influence of extreme mental or emotional disturbance. That the victim was a participant in the defendant's conduct or consenting to the act. That the defendant was an accomplice in an offense for which he is to be sentenced by the offense was committed by another person and the defendant's participation was relatively minor.
>
> That the defendant acted under extreme duress or under the substantial domination of another person. The capacity of the defendant to appreciate the criminal activity of his conduct or to conform his conduct to the requirements of the law was substantially impaired. The age of the defendant at the time of the crime.
>
> Aggravating circumstances as I have outlined to you must be established beyond a reasonable doubt before they may be considered by you in arriving at your decision.
>
> Proof of aggravating circumstances beyond a reasonable doubt is evidence by which the understanding judgment and reason of the jury are well satisified and convinced to the extent of having a full, firm and abiding conviction that the circumstances had been proved to the exclusion of and beyond any reasonable doubt.
>
> Evidence tending to establish an aggravating circumstance which does not convince you beyond a reasonable doubt of the existence of such circumstances at the time of the offense should be disregarded.
>
> If one or more aggravating circumstances are established, you should consider all the evidence tending to establish one or more mitigating circumstances and give that evidence such weight as you feel it should receive in reaching your conclusion as to the sentence which should be imposed.

(R. 1625, 1627-1629).

In considering the instructions in their entirety, this Court is unable to ascertain any prejudice to the petitioner

sufficient to find that the charge did not fairly present the issues to the jury.

The petitioner's contention that Judge Cowart improperly limited the number of mitigating factors which could be considered by the jury is equally without merit. As this Court has discussed in point I of this recommendation, the petitioner was permitted great latitude in presenting any and all witnesses in mitigation to the jury. Judge Cowart also advised counsel that he would permit consideration of all matters deemed relevant to sentencing. (R. 1619-1620, 1625). In fact, Judge Cowart instructed the jury:

> During the hearing you will receive evidence and testimony concerning certain aggravating and mitigating circumstances and all other matters that the Court deems relative to sentencing. (Emphasis added).

(R. 1625). In his continuing preliminary charge, Judge Cowart directed the jury that they must consider specifically delineated aggravating and mitigating circumstances, but no where in the charge did he limit the mitigating circumstances which the jury could consider nor did he limit in any way the petitioner's presentation of mitigating circumstances through live testimony or on closing argument. Thus, Judge Cowart properly advised the jury of aggravating and mitigating circumstances to be considered by them and permitted them to consider "all other matters" that he deemed "relative to sentencing." (R. 1625).

IX. Illegal Search and Seizure

The petitioner contends that a statement made by him and physical evidence seized from his automobile were products of unconstitutional acts by the police and violated his fourth, fifth, sixth and fourteenth amendment rights. The petitioner proposes that his confession of the crime was obtained through coercion

and in violation of his rights under Miranda v. Arizona, 384 U.S. 436 (1966). Further, the petitioner contends, the search of his auto and seizure of the physical evidence found therein violated the petitioner's right to be free from unreasonable searches and seizures.

Despite this Court's concurrence with the trial judge's decision on the petitioner's motion to suppress, the issue of admissibility of evidence is a matter of state law and procedure and does not involve federal constitutional error. State evidentiary questions generally are not permissible grounds for federal habeas corpus relief to a state prisoner and may not be brought properly before the federal courts. Lisenba v. California, 314 U.S. 219 (1941); rehearing denied 315 U.S. 826 (1942); Mercado v. Massey, 536 F.2d 107 (5th Cir. 1976); Heads v. Beto, 468 F.2d 240 (5th Cir. 1972); Young v. Alabama, 443 F.2d 854 (5th Cir. 1971); Pleas v. Wainwright, 441 F.2d 56 (5th Cir. 1971).

In the case of Stone v. Powell, 428 U.S. 465, rehearing denied 429 U.S. 874 (1976), the Supreme Court held that where the state has provided an opportunity for full and fair litigation of a fourth amendment claim, a state petitioner may not be granted federal habeas corpus relief. Thus, federal courts may review the merits only where the state has not rovided this opportunity. See, Caver v. Alabama, 577 F.2d 1188 (5th Cir. 1978); Brown v. Wainwright, 574 F.2d 200 (5th Cir. 1978); O'Berry v. Wainwright, 546 F.2d 1204 (5th Cir. 1977); Wright v. Wainwright, 537 F.2d 224 (5th Cir. 1976).

In the Caver case, supra at 1193, the Fifth Circuit said:

> [I]f state procedures afford the defendant in a criminal case the opportunity to litigate whether evidence obtained in violation of the fourth amendment should be excluded, and if that opportunity to litigate fourth amendment issues is "full and fair" within the meaning of O'Berry v. Wainwright, 546 F.2d 1204 (5th Cir. 1977); then Stone v. Powell precludes federal habeas corpus consideration of

> those issues whether or not the defendant avails himself of that opportunity. Accord, Gates v. Henderson, 568 F.2d 830 (2d Cir. 1977) (en banc). Indeed, the opposite rule would allow a defendant to reserve search issues for collateral attack and thus stand the purposes of Stone v. Powell on their head.

In the case of Graves v. Estelle, 556 F.2d 743 (5th Cir. 1977), the Court set forth that the burden is on the petitioner to plead and prove, at the federal level, a want of opportunity to fairly and fully litigate any fourth amendment claim in the state court.

A review of the record in this case, both in the state courts and of hearing before this Court, compels this Court to find conclusively that the petitioner received a full and fair opportunity to litigate his claim in the state forum. In reaching this conclusion, the Court has not disregarded the petitioner's claim that Mr. Windsor improperly carried the burden of proof at the hearing on the motion to suppress. Rather, the Court has analyzed this issue in light of that allegation and again finds no ineffective assistance of counsel and no denial of due process of constitutional magnitude.

X. Faulty Indictment

The petitioner alleges that the indictment charging him with first degree murder was fatally defective resulting in a denial of his sixth and fourteenth amendment rights. Specifically, the petitioner contends that under a two count indictment he was charged with both the robbery and the murder of Donald Schmidt. The murder charge was contained in Count One of the Indictment, tracked the statutory language and charged that the murder was committed in violation of Section 782.04 of the Florida Statutes. The petitioner further contends that as he was indicted and tried

for both premeditated murder and for felony murder, the indictment count charging murder was duplicitous and therefore fatally defective. The petitioner cites the Court to Article I, Section 16 of the Florida Constitution and to Rule 3.150(a) of the Florida Rules of Criminal Procedure in support of his position. The petitioner suggests that by charging and trying the petitioner on both forms of first degree murder which was contained in only one count of the indictment, the petitioner was deprived of his federal and Florida constitutional rights to due process in that the state failed to charge the particular elements of each offense and to adequately apprise him of what to prepare to meet at trial.

The petitioner's failure to raise this issue either at trial or on direct appeal suggests that the petitioner has waived his right to challenge the indictment. Wainwright v. Sykes, supra. For example, in the case of Spinkellink v. Wainwright, supra at 609, the Fifth Circuit said:

> A review of the record indicates that neither Spenkelink nor his attorney objected at trial to the indictment, which Fla.R.Crim.P. 3.190(c) requires in order for the alleged defect to be preserved for appellate review. Accordingly, the defect, if any, was waived. Wainwright v. Sykes, supra; Tennon v. Ricketts, 5 Cir., 1978, 574 F.2d 1243 [1978]; St. John v. Estelle, 5 Cir., 1977, 563 F.2d 168 (en banc); Nichols v. Estelle, 5 Cir., 1977, 556 F.2d 1330; Loud v. Estelle, 5 Cir., 1977, 556 F.2d 1326, 1329-30. . . .

However, the Court notes that the essence of an indictment is to apprise a defendant of the nature of the charges against him to permit him to adequately plead to the charges. See, United States v. Camacho, 528 F.2d 464 (9th Cir.), cert. denied

425 U.S. 995 (1976). From an examination of the indictment and the record, and recognizing the liberal rules of discovery provided defendants in the state courts, it is clear that even if the petitioner had not waived his right to attack the indictment, his attack would have failed. See, United States v. Sampson, 371 U.S. 75 (1962); United States v. Debrow, 346 U.S. 374 (1953); United States v. South Florida Asphalt Co., 329 F.2d 860 (5th Cir. 1964).

XI. Denial of Due Process at Motion to Vacate

On March 15, 1979, the petitioner filed a post-conviction Motion to Vacate pursuant to Rule 3.850 of the Florida Rules of Criminal Procedure collaterally attacking, in part, the effectiveness of his court-appointed counsel. On April 26, 1979, Judge Ellen Morphonios Gable, held a hearing to determine if an evidentiary hearing should be conducted on the petitioner's motion. She determined that the petitioner had established a prima facie case on the issue of ineffective assistance of counsel and scheduled the evidentiary hearing for May 1, 1979. Over the objection of both the state and the petitioner's counsel, Judge Gable ruled that the petitioner would not be brought to the hearing. However, Judge Gable advised the petitioner's counsel that she not only would consider anything which the petitioner wished to submit in writing but also would accept the petitioner's affidavits as truth. The petitioner's affidavits were filed on the date of hearing.

At hearing, only the petitioner's previous attorney, Denis Dean, appeared and testified despite the petitioner's allegation in his Motion to Vacate that he received ineffective assistance of counsel from both Raymond Windsor and Denis Dean. However, the Court notes from the record that prior to and at the hearing on Motion to Vacate, the petitioner's counsel did not object to

Mr. Windsor's absence, never requested that he be present and, at the close of the state's presentation, sought to call only the petitioner to testify. (Transcript of hearing on Motion to Vacate, p. 53). Therefore, as the petitioner has waived any right to object to Mr. Windsor's absence at the hearing, the Court must address only the issue of denial of due process owing to the petitioner's absence from hearing on the Motion to Vacate.

Rules 1 and 3.850 of the Florida Rules of Criminal Procedure specifically provide that a movant who is in custody does not have to be produced and be present at hearing on his Motion to Vacate. The decision whether to produce the movant rests within the sound discretion of the court but such discretion must be exercised in light of applicable legal principles and due process requirements. United States v. Derosier, 229 F.2d 599 (3rd Cir. 1956); State v. Reynolds, 238 So.2d 598 (Fla. 1970); Lee v. State, 217 So.2d 861 (Fla. 4th DCA 1969); Bryant v. State, 204 So.2d 9 (Fla. 3rd DCA 1967). In exercising its discretion, the court must look to whether there exist factual disputes about which the movant has personal knowledge and which cannot be resolved without his presence. Eby v. State, 306 So.2d 602 (Fla. 2d DCA 1975); remanded and reversed on other grounds 342 So.2d 1087 (Fla. 2d DCA 1977), cert. dismissed 346 So.2d 1248 (Fla. 1977); Van Eaton v. State, 226 So.2d 265 (Fla. 2d DCA 1969); Lambert v. State, 169 So.2d 374 (Fla. 1st DCA 1964). If the motion can be disposed of on the record, failure to produce the movant would not be error. Roy v. Wainwright, 151 So.2d 825 (Fla. 1963). In some instances, the presence of counsel "may be an adequate alternative to the presence of the petitioner, if petitioner would not be prejudiced through his absence...." State v. Reynolds, supra at 599.

Despite the abundance of Florida legal authority on this point and owing, in part, to Florida's rule being copied almost verbatim from the applicable federal statute, it is necessary also to examine federal precedents and authority. See, Dickens v. State, 165 So.2d 811 (Fla. 2d DCA 1964). Under federal authority, a petitioner has no automatic right to be present at a hearing on his motion to vacate. Phillips v. United States, 533 F.2d 369 (8th Cir.) cert. denied 429 U.S. 924 (1976). In instances where numerous affidavits have been filed and where the facts may be fully investigated without the petitioner's presence, the petitioner need not be produced. Machibroda v. United States, 368 U.S. 487 (1962); Villarreal v. United States, 508 F.2d 1132 (9th Cir. 1974).

Title 28 U.S.C. § 2254 provides:

> (d) In any proceeding instituted in a Federal court by an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court, a determination after a hearing on the merits of a factual issue, made by a State court of competent jurisdiction in a proceeding to which the applicant for the writ and the State or an officer or agent thereof were parties, evidenced by a written finding, written opinion, or other reliable and adequate written indicia, shall be presumed to be correct, unless the the applicant shall establish or it shall otherwise appear, or the respondent shall admit
>
> (1) that the merits of the factual dispute were not resolved in the State court hearing;
>
> (2) that the factfinding procedure employed by the State court was not adequate to afford a full and fair hearing;
>
> (3) that the material facts were not adequately developed at the State court hearing;
>
> (4) that the State court lacked jurisdiction of the subject matter

> or over the person of the applicant in the State court proceeding;
>
> (5) that the applicant was an indigent and the State court, in deprivation of his constitutional right, failed to appoint counsel to represent him in the State court proceeding;
>
> (6) that the applicant did not receive a full, fair, and adequate hearing in the State court proceeding; or
>
> (7) that the applicant was otherwise denied due process of law in the State court proceeding;
>
> (8) or unless that part of the record of the State court proceeding in which the determination of such factual issue was made, pertinent to a determination of the sufficiency of the evidence to support such factual determination, is produced as provided for hereinafter, and the Federal court on a consideration of such part of the record as a whole concludes that such factual determination is not fairly supported by the record:
>
> And in an evidentiary hearing in the proceeding in the Federal court, when due proof of such factual determination has been made, unless the existence of one or more of the circumstances respectively set forth in paragraphs numbered (1) to (7), inclusive, is shown by the applicant, otherwise, appears, or is admitted by the respondent, or unless the court concludes pursuant to the provisions of paragraph numbered (8) that the record in the State court proceeding, considered as a whole, does not fairly support such factual determination, the burden shall rest upon the applicant to establish by convincing evidence that the factual determination by the State court was erroneous.

In the Spinkellink case, supra, the Fifth Circuit said:

> In support of his contentions that the trial court erred in not holding an evidentiary hearing on some of his claims and that the trial court held an inadequate hearing on others, the petitioner points to Townsend v. Sain, 372 U.S. 293, 313, 83 S.Ct. 745, 757, 9 L.Ed.2d 770 (1963), where the Supreme Court

> set forth the circumstances under which a federal district court must hold an evidentiary hearing on allegations in a habeas corpus petition. The requirements of Townsend as to when a hearing must be held are now codified in 28 U.S.C. § 2254. When, however, it affirmatively appears from the petition that a petitioner is not entitled to the writ, an evidentiary hearing is unnecessary. Guillory v. Allgood, 5 Cir., 1967, 379 F.2d 273, 274. See also Coco v. United States, 5 Cir., 1978, 569 F.2d 367, 369.

578 F.2d at 590.

Thus, this Court is directed to examine the record carefully before granting an evidentiary hearing to the petitioner. In the instant case, it was difficult to assign a specific reason within 28 U.S.C. § 2254(d) to grant or deny evidentiary hearing to the petitioner as the record in the state courts was silent or incomplete on a number of matters. This Court's duty includes the obligation to grant an evidentiary hearing where it has articulable reason to believe that the petitioner's claims are not without merit even if the Court is unable to assign specific statutory itemized designation within 28 U.S.C. § 2254(d). Once the determination is made that the federal courts have the authority to conduct such an evidentiary hearing, both federal and Florida law are in agreement that if factual issues exist where the petitioner has unique and valuable knowledge necessary to the hearing which cannot be obtained absent his testimony, the petitioner must be brought to the hearing.

In its majority opinion in Sullivan v. State, 372 So.2d 938 (Fla. 1979), the court affirmed the lower court's denial of the petitioner's Motion to Vacate without addressing the merits of the issue now presented. In affirming the lower court, the Supreme Court of Florida, sub silento, also denied the peti-

tioner's appeal on the issue of the propriety of Judge Gable's refusal to return him for hearing on his motion.

However, three justices of the Supreme Court of Florida dissented and said:

> At the conclusion of the hearing on this issue, the trial court denied all relief. The court subsequently entered a written order denying all relief. Contrary to the dictates of rule 3.850, however, the order did not contain findings of fact and conclusions of law....
>
> The record demonstrates that there are at least three colorably meritorious issues presented. First, the trial court failed to comply with the requirements of rule 3.850 in not making findings of fact and conclusions of law- a requirement which is calculated to make meaningful review possible. Second, the only evidence regarding the effectiveness of appellant's original counsel comes from the testimony of the state's only witness at the hearing. That witness, who represented appellant at trial and on appeal, testified that he had told appellant that his original counsel had afforded him ineffective assistance during pre-trial proceedings.
>
> Finally, a substantial question is presented as to whether the trial court abused its discretion by denying the appellant the opportunity to be present and to testify at the hearing on the 3.850 motion. State v. Reynolds, 238 So.2d 598 (Fla. 1970), holds that one in custody, even in another state, must be presented before the trial court to testify where there are questions of fact within his personal knowledge. Mr. Justice Adkins, speaking for a unanimous Supreme Court, said:
>
> If, upon hearing, there are questions of fact within the personal knowledge of the prisoner to be resolved, then the prisoner should be given an opportunity to testify. As stated in Bryant v. State [Fla. App., 204 So.2d 9], supra:

> "when there are questions of fact to be decided, it may be the better practice to receive evidentiary statements from a movant either by his being present in the court or by written interrogatories or by deposition taken before a commissioner at the penal institution wherein the movant is incarcerated."
>
> 238 So.2d at 600.

372 So.2d at 940-941.

In reviewing this issue, this Court experienced the same concern as that of the dissenting justices. On one hand, this Court recognizes that Judge Gable exercised judicial discretion in denying the petitioner's request to be returned, and the Supreme Court of Florida affirmed her decision. On the other hand, this Court is familiar with the nature of the petitioner's allegations in his Motion to Vacate and the viable reasons for his request to be present.

This Court is reluctant to second-guess the majority justices of the Supreme Court of Florida as hindsight almost always operates with 20/20 vision. Their decision is silent on the merits of this point. However, as there is no indication that the court refused to review the issue on its merits, this Court may consider them. Ratcliff v. Estelle, 597 F.2d 474 (5th Cir. 1979); Bishop v. Wainwright, 511 F.2d 664 (5th Cir. 1975).

The record reflects that although Judge Gable refused to return the petitioner to the hearing, she did permit the petitioner to submit anything he wished in affidavit form and said she would consider his submissions as truth. At hearing, she considered the petitioner's lengthy affidavit as well as testimony from Mr. Dean. It does not appear from the record of that hearing that the petitioner's counsel was hampered in his cross-examination by the petitioner's absence nor did the petitioner seek to call anyone but his client to testify. The petitioner's

counsel made no proffer to the court that the petitioner would testify to any matters not contained in his affidavit which were vital to a just determination of his motion. Had he done so, the court might have recessed the hearing and ordered the petitioner brought:

> THE COURT: If it became vital to bring Mr. Sullivan in the course of any testimony, then I will reconsider on that, but as of this moment I'm not going to do that. I just don't believe that the blanket allegations--if Mr. Sullivan had not set forth his complaint in his petition in such detail perhaps I'd be taking a different view, but I don't believe that the body of Mr. Sullivan present before this Court could add any more to the allegation he had inadequate counsel, and for that reason I am ruling that his presence is not necessary." (Transcript of hearing on Motion to Vacate, p.6).

As Judge Gable did not issue findings of fact and law, as required by the statute, this Court must rely only upon the record of that hearing and on the Supreme Court of Florida's subsequent action. It is unable to rule conclusively that either Judge Gable or the Supreme Court of Florida erred.

However, as this Court was deeply concerned with the actions taken by both Judge Gable and the Supreme Court of Florida and in light of the dearth of identifiable reasons for their decisions, this Court corrected any error which may have occurred below and held a hearing on the issue of effective assistance of counsel. At hearing, the petitioner and all necessary parties were present, and the petitioner not only was not limited in his presentation but he was encouraged to expand the hearing to any matters on the issue which he thought might

be relevant. The petitioner wanted his day in court and he got it. If error occurred in the state courts, that error has since been rendered harmless.

XII. Denial of Due Process by the Supreme Court of Florida

The petitioner contends that he was denied due process in that the Supreme Court of Florida ruled on the merits of his appeal from the denial of his Motion to Vacate without providing him the opportunity to brief or argue the merits. The petitioner stated:

> Petitioner filed a notice of appeal and his appeal was docketed in the Florida Supreme Court on May 25, 1979. While his appeal was pending, the Governor of Florida signed his death warrant on June 19, 1979, scheduling the execution for June 27, 1979 at 7:00 A.M. Petitioner immediately filed a motion to stay the execution with the Florida Supreme Court. That Court entered an order on June 20, 1979, setting the motion for stay for oral argument on June 22, 1979; this order advised the parties that the argument would be confined solely to the issue of staying the execution. At the outset of the oral argument, the Chief Justice advised the parties to confine their arguments solely to the issue of the stay and not to argue the merits of the cause. Incredibly, after the oral argument, the Court entered an order affirming the trial court's order and denying a stay.
>
> Petitioner was never given any notice that the court would decide the substantive issues of his appeal and was never given the opportunity to brief or argue them. Neither the Florida trial court nor Supreme Court gave petitioner a fair hearing on his claims.

The record reveals that before ruling on the merits of the petitioner's appeal of the trial court's denial of his Motion

to Vacate, the Supreme Court of Florida had before it:

1. the petitioner's Notice of Appeal;

2. the petitioner's Motion for Stay of Execution detailing his many claims;

3. a copy of the petitioner's extensive Motion to Vacate and memorandum of law filed in the trial court and the petitioner's lengthy affidavit attached thereto;

4. the petitioner's Supplemental Memorandum of Fact and Law filed June 19, 1979;

5. the respondent's response to the petitioner's Motion for Stay of Execution filed June 21, 1979;

6. the respondent's Motion to Quash Appeal and/or Motion to Affirm Order Appealed filed June 21, 1979;

7. the trial judge's written Order denying the petitioner's Motion to Vacate but without written findings of fact and conclusions of law;

8. the transcript of the hearing held on the petitioner's Motion to Vacate;

9. the entire record on appeal from the trial court.

In ruling on the merits of the petitioner's appeal, the Supreme Court of Florida ruled before the parties could present formal briefs and held no hearing on the issues.

While not approving that Court's procedures, this Court does not find an abuse of discretion so heinous as to rise to a level of constitutional magnitude requiring action by the federal courts.

Florida law provides that it is the petitioner's responsibility to provide the court of appeal with a record that is sufficient to

allow that court to review the matter. Johnson v. Town of Eatonville, 203 So.2d 664 (Fla. 4th DCA 1967). The makeup of that record is not specifically delineated by law but must originate from sources which will accurately reflect the proceedings in the lower court. Burau v. State, 353 So.2d 1183 (Fla. 3rd DCA 1977); Lee v. State, 165 So.2d 443 (Fla. 2d DCA 1964); McMahon v. State, 165 So.2d 431 (Fla. 2d DCA 1964); Williams v. State, 163 So.2d 767 (Fla. 3rd DCA 1964). As noted, there is no legal authority for the proposition that the appellate court must permit the filing of and consider briefs by the parties before ruling on the issues. Nor is there any legal requirement that the appellate court permit oral argument. See, Gillen v. State, 172 So.2d 1 (Fla. 2d DCA 1965). Clearly, the essential record must be such as to accurately reflect the facts, the proceedings upon appeal and the legal issues raised by the parties.

In its opinion filed June 22, 1979 denying the petitioner's Motion for Stay of Execution and affirming the trial court's denial of the petitioner's Motion to Vacate, the Supreme Court of Florida had a record which fully set forth the facts and legal issues raised by the parties. The Court's opinion reflects its consideration of that record, notes the record's infirmities, sub silento finds those infirmities insufficient to constitute reversible error and acceded to the state's request that the petitioner's appeal be decided on its merits without affording the petitioner the opportunity to present his case on its merits. Sullivan v. State, 372 So.2d 938 (Fla. 1979) (see, both majority and dissenting opinions).

The better procedure might well have been to schedule briefing periods and to permit oral argument before ruling on the merits of an appeal by a petitioner sentenced to die. However, the Supreme Court of Florida's decision to rule without providing

these benefits to the petitioner was a decision properly within the judicial discretion of that Court, did not constitute an abuse of that discretion and did not result in due process deprivations to the petitioner.

Almost as an aside, this Court reflects on the petitioner's claim of denial of due process by the Supreme Court of Florida and recognizes that even if that Court had erred, the petitioner's relief would be remand to that Court for briefing and oral argument of an issue heard in great detail by this Court at hearing on the petitioner's Petition for Writ of Habeas Corpus. The foundation of the petitioner's request to the Supreme Court of Florida was his desire for his "day in court" on his claim of ineffective assistance of counsel. He has now had that day before this Court who not only permitted the petitioner to be present but also gave the petitioner every opportunity to present his case at a hearing where all rules of procedure were interpreted liberally in favor of the petitioner.

Again, however, this Court emphasizes that its determination on this issue rests not upon the avenues of relief granted the petitioner in the federal courts but upon its finding of the absence of error of constitutional magnitude by the Supreme Court of Florida.

CONCLUSION

As the 118 pages of this Review and Recommendation reflect, this Court has conducted an exhaustive review of the record, pleadings, transcripts and law applicable to this cause. In light of the petitioner's overall claims of ineffective assistance of counsel, it was necessary to review matters which otherwise would not be properly before the Court. However, in so doing, the Court has considered all of the claims and issues raised by

the petitioner and, being thus advised, it is hereby

RECOMMENDED as follows:

1. that the Honorable Jose A. Gonzalez deny the respondent's Motion to Vacate;

2. that the Honorable Jose A. Gonzalez deny the petitioner's Petition for Writ of Habeas Corpus on its merits.

The parties to this action shall have twenty (20) days from the date of this Review and Recommendation in which to file their objections, if any, with the Honorable Jose A. Gonzalez.

DONE AND SUBMITTED at West Palm Beach, Florida this 19 day of March, 1981.

PATRICIA JEAN KYLE
UNITED STATES MAGISTRATE

cc: All counsel of record

APPENDIX B

Final Order of the United States District Court for the Southern District of Florida dismissing Petition for Writ of Habeas Corpus, dated June 4, 1981.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

ROBERT A. SULLIVAN,

Petitioner,

vs

LOUIE L. WAINWRIGHT, etc., et al.,

Respondents.

CASE NO. 79-2721-CIV-JAG

FINAL ORDER OF DISMISSAL

THIS CAUSE is before the court upon the Review and Recommendation submitted by the United States Magistrate and the respondents' and petitioner's objections thereto.

Petitioner, Robert A. Sullivan, filed a Petition for Writ of Habeas Corpus pursuant to 28 U.S.C. § 2254 and a Motion for Stay of Execution. The Court granted the Motion for Stay of Execution to afford petitioner the opportunity to present the constitutional issues raised in his petition in the federal forum.

Thereafter, the matter was referred to the Honorable Patricia Jean Kyle, United States Magistrate, for evidentiary hearing, review, and recommendation. In March, 1980 Judge Kyle heard extensive testimony and received evidence from the respective parties. After considering every issue raised by petitioner, Judge Kyle submitted a comprehensive and thoroughly researched 119 page Review and Recommendation.

The parties were allowed to file objections, if any, to the Magistrate's Review and Recommendation, and both parties submitted objections for this court's consideration. The court heard argument on those objections, and has independently reviewed the record and the memoranda of law of the proceedings before the Magistrate, as well as relevant portions of the trial record of the original trial.

The respondents do not object to the ultimate conclusion reached by the Magistrate. Instead they focus on the reasoning employed in reaching that final determination.

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First respondents object to the Magistrate's finding that the "cause" and "prejudice" requirement of Wainwright v. Sykes, 433 U.S. 72 (1977) does not bar a consideration of the merits of the petition.

In Wainwright v. Sykes the Court held that absent a showing of "cause" and "prejudice" attendant to a state procedural waiver of an objection to the admission of a confession at trial, federal habeas relief is barred. 433 U.S. at 87.

Respondents contend that the Magistrate's conclusion that petitioner had not been denied his right to the effective assistance of counsel forecloses a review of the merits forming the underlying basis for the alleged denial of Sixth Amendment rights - unless petitioner demonstrates "cause" and "prejudice" for trial counsel's failure to present the arguments raised in the petition.

In support, respondents rely on Lumpkin v. Ricketts, 551 F.2d 680, 682-83 (5th Cir.), cert. denied, 434 U.S. 957 (1977), where the court stated as follows:

> ...[P]etitioner has not demonstrated cause for failing to make a timely challenge (to the grand jury venire under state law). His only allegation in this regard is that his trial attorney provided ineffective assistance of counsel in failing to so object. This assertion must be rejected, however, for, if accepted, it would effectively eliminate any requirement of showing cause at all. If a petitioner could not demonstrate any legitimate cause, he would only have to raise the spectre of ineffective assistance of counsel to get his challenge heard. This we refuse to sanction.

Similarly, in Indiviglio v. United States, 612 F.2d 624 (2d Cir. 1979), cert. denied, 100 S. Ct. 1326 (1980), the court held that, "[w]ithout some showing that counsel's mistakes were so egregious as to amount to a Sixth Amendment violation, a mere allegation of error by counsel is insufficient to establish 'cause' to excuse a procedural default." 612 F.2d at 631.

The court finds these cases distinguishable.

In the instant case the alleged deficiencies of counsel are inextricably intertwined with the underlying claims for which no objections were made at trial. Petitioner does not simply raise

the spectre of ineffective counsel to avoid the "cause" and "prejudice" requirement. This is not a case of an isolated instance where counsel failed to make a timely objection. Here the claim of ineffective counsel commences with Mr. Windsor's failure to interview petitioner for 90 days and continues through Mr. Dean's failure to raise specific issues on appeal. Petitioner alleges numerous investigatory, procedural, and strategic deficiencies of a constitutional magnitude.

The claim of ineffective counsel and the constitutional merits are widespread and inseparable. This court is not unmindful of the potential "bootstrapping" strategy to avoid the cause and prejudice rule. Nevertheless, to bar a consideration of the issues absent a showing of cause and prejudice would, under the circumstances, irreparably prejudice petitioner.

The court will accordingly overrule the objection and allow petitioner to proceed on the merits of his claim.

Second, respondents object to the Magistrate's denial of their motion to strike petitioner's allegation of ineffective assistance of counsel. The gravamen of the objection is that when respondents inquired of petitioner in their case in chief, petitioner exercised his Fifth Amendment privilege against self-incrimination.

The issue before the court is whether petitioner's claim of a denial of effective assistance of counsel should be dismissed because he exercised his Fifth Amendment privilege against self-incrimination during direct examination when called to testify by respondents as part of their case.

Respondents maintain that since petitioner would have been precluded from invoking the Fifth Amendment during cross-examination, petitioner should not be allowed to use the amendment's protection during direct examination. Respondents rely on Brown v. United States, 356 U.S. 148 (1958) where the Court stated that a party who is a witness

> has the choice, after weighing the advantage of the privilege against self-incrimination against the advantage of putting forward his

> version of the facts and his reliability as a witness, not to testify at all. He cannot reasonably claim that the Fifth Amendment gives him not only this choice, but if he elects to testify, an immunity from cross-examination on the matters he has himself put in dispute. It would make of the Fifth Amendment not only a humane safeguard against judicially coerced self-disclosure but a positive invitation to mutilate the truth a party offers to tell. 356 U.S. at 155-56.

The court does not find Brown dispositive of the issue.

First, in the instant case, respondents subjected petitioner to a vigorous cross-examination during which petitioner did not invoke the Fifth Amendment. His assertion of his privilege against self-incrimination was made during the course of direct examination when called to testify by the respondents.

Second, the court finds Wehling v. Columbia Broadcasting System, 608 F.2d 1084 (5th Cir. 1979) enlightening. There the appellate court reversed the dismissal of a civil action wherein plaintiff asserted his Fifth Amendment privilege in response to a court order to comply with defendant's request for discovery. The court emphasized that

> a civil plaintiff has no absolute right to both his silence and his lawsuit. Neither, however, does the civil defendant have an absolute right to have the action dismissed anytime a plaintiff invokes his constitutional privilege. When plaintiff's silence is constitutionally guaranteed, dismissal is appropriate only where other, less burdensome, remedies would be an ineffective means of preventing unfairness to defendant. 608 F.2d at 1088.

This balancing-of-interests approach affords protection to both parties. These respondents are protected since they had already subjected petitioner to cross-examination, and hence were not denied the opportunity of defending themselves or of presenting their own case.

Moreover, the petitioner's refusal to answer respondents' questions during direct examination may result in an adverse inference by the finder of fact against the petitioner. See Baxter v. Palmigiano, 425 U.S. 308, 318 (1976) (dictum); Hughes Tool

Company v. Meier, 489 F. Supp. 354, 374-75 (D. Utah 1977); Poplar Grove Planting & Refining Co., Inc. v. Bache Halsey Stuart, Inc., 465 F. Supp. 585, 591 (M.D. La.), rem'd on other grounds, 600 F.2d 1189 (5th Cir. 1979); Justice v. Laudermilch, 78 F.R.D. 201, 203 (M.D. Pa. 1978).

In conclusion it is clear that a dismissal of petitioner's claim is not an appropriate remedy for his exercise of his Fifth Amendment privilege.

Respondents' objection to the Magistrate's denial of their Motion to Strike must be overruled, and all of respondents' objections must be rejected.

Petitioner raises numerous objections to the Magistrate's Review and Recommendation. The court will consider two of them in some detail.

First, petitioner maintains that the trial court made an improper determination in its findings of aggravating circumstances. The non-statutory aggravating factor complained of is contained in paragraph 3 of Judge Cowart's findings and sentence, to wit:

> 3. This Court has observed the demeanor and the action of the defendant throughout this entire trial and has not observed one scintilla of remorseness displayed, indicating full well to this Court that the death penalty is the proper selection of the punishment to be imposed in this particular case. Trial Transcript at 1697.

Petitioner contends that once the non-statutory aggravating factor is removed, the aggravating and mitigating circumstances cancel each other out and this court is unable to determine whether the improperly used factor "tipped the balance" against petitioner.

In support petitioner relies on Stephans v. Zant, 631 F. 2d 397 (5th Cir. 1980). There, the issue, inter alia, was as follows:

> whether the death penalty was invalid under the Constitution because it was imposed when one of the aggravating circumstances was later held to be unconstitutional even though two other aggravating circumstances, either of which by itself would be legally sufficient to permit the jury to impose the death penalty and as to both of which there is no uncertainty. Id. at 406.

The court held in the affirmative because "[i]t is impossible for a reviewing court to determine satisfactorily that the verdict in this case was not decisively affected by an unconstitutional statutory aggravating circumstance." Id. at 406. Since the role, if any, that the non-statutory aggravating factor played could not be determined, the constitutional requirement that the death penalty be imposed only after the sentencer's discretion has been chanelled was absent.

In the instant case, unlike Stephens, the jury did not consider the non-statutory aggravating factor. The petitioner's failure to display any remorse was only considered by the trial court in the written findings made pursuant to Fla. Stat. § 921.141(3). Moreover, the non-statutory factor was not the sole factor considered by the court. In his written findings Judge Cowart specified the following statutory aggravating circumstances:

> 1. That sufficient aggravating circumstances exist in this particular case that far outweigh any mitigating circumstances in the Record. The death of this decedent occurred while the defendant was engaged in the commission of the crime of armed robbery. In addition thereto, the capital felony was committed for pecuniary gain, as the decedent had been robbed of his personal possessions as well as the possessions of the company he represented. These facts alone in this Court's judgment could justify the imposition of the death penalty, but this particular killing is far more useless and heinious than these.
>
> 2. The Court finds that the capital felony committed in this case was especially heinious, atrocious and cruel. The Supreme Court of Florida in consideration of the legalities of the recently enacted death sentence in the State of Florida decreed that these terms were to receive their common connotations and decreed that "heinious" meant "extremely wicked or shockingly evil", "atrocious" meant "outrageously wicked and vile" and "cruel" meant "a design to inflict a high degree of pain with utter indifference to or even enjoyment of the suffering of others." See State vs. Dixon, 283 So. 2nd 1, pg 9, Florida Supreme Court, 1973. This Court cannot conceive of the commission of a crime that is more vividly described by these words as set forth by the Supreme Court than the one at bar. The defendant in this case saw fit to braggadociously state that he wanted to commit a "crime" which in his mind was to be "the perfect crime". The decedent was bound with hands behind his body with adhesive tape, mentally toyed with by the defendant as to operating and management techniques of the establishment where he worked, a place where the defendant himself has previously been employed. After this mental exercise,

> the decedent was led to a lonely spot in Dade County with hands still behind him and as he stumbled in the darkness, struck from behind with a tire iron, and then again from behind, while on the ground in a total helpless position, was mortally wounded with four blasts from a .12 gauge shotgun to the back of the head. This Court cannot conceive of a more conscienceless crime. Trial Transcript at 1694-96.

Once the improper aggravating factor is removed, there remain two aggravating and two mitigating circumstances.[1] The statutory mandate that death may not be imposed absent a finding "that there are insufficient mitigating circumstances to outweigh the aggravating circumstances", Fla. Stat. § 921.141(3)(b), is not met by a quantitative measurement. Instead, the court must engage in a qualitative analysis to ensure that the death penalty is not imposed arbitrarily, capriciously, or discriminately. As the court stated in State v. Dixon, 283 So.2d 1, 10 (Fla. 1973):

> It must be emphasized that the procedure to be followed by the trial judges and juries is not a mere counting process of X number of aggravating circumstances and Y number of mitigating circumstances, but rather a reasoned judgment as to what factual situations require the imposition of death and which can be satisfied by life imprisonment in light of the totality of the circumstances present.

The trial court's written findings establish that any error caused by the use of an improper factor, does not invalidate the imposition of petitioner's death sentence. See Antone v. State, 382 So. 2d 1205, 1216 (Fla.) cert. denied, 101 S.Ct. 287 (1980). The court, after considering the statutory aggravating circumstance set forth in paragraph 1 of the written findings, states that "These facts alone in this court's judgment could justify the imposition of the death penalty, but this particular killing is far more useless and heinious than these." (Trial Transcript at 1694-95). Moreover, the trial court concluded that "the aggravating circumstances in this case purely outweigh beyond and to the exclusion of every reasonable doubt in the Court's mind the mitigating circumstances." (Trial Transcript at 1697) (emphasis added).

This court accordingly concludes that the record sustains the imposition of the death penalty.

Petitioner also contends that the trial court improperly doubled the statutory aggravating circumstances of felony murder and pecuniary gain, Fla. Stat. § 921.141(5)(d) and (f), in violation of the dictates of Provence v. State, 337 So.2d 783, 786 (Fla. 1976).

A fair reading of Judge Cowart's findings establishes the existence of two statutory aggravating circumstances (the court has previously rejected the third). The structure of the findings shows that each aggravating circumstance is considered in a separately numbered paragraph. There is no reason to believe that the first paragraph contains two aggravating circumstances whereas the remaining paragraph includes only one.

This court can add nothing to the thorough, complete and exhaustive discussion of the facts and the law contained in Judge Kyle's Review and Recommendation.

It will be adopted in its entirety and hereinafter made the Order of this court except as hereinabove modified with respect to respondents' second objection to said Review.

This court's independent de novo review of the record of these proceedings convinces it that petitioner's main claim that he was denied effective assistance of counsel is totally without merit.

The record clearly demonstrates that his counsel have throughout discharged their grave and solemn duty to petitioner in a manner consistent with the highest technical and ethical standards of their profession.

Petitioner says that he has received effective assistance of counsel in connection with the instant petition. Transcript of the instant habeas corpus proceedings at page 619. He also states that he can think of nothing else that has not previously been raised in either his 3.850 petition or in this petition which might bear upon whether he "received fair representation and a fair trial ever since the day (he) got arrested..." Id. at 620-621.

The court trusts that all of the issues have now been fully litigated.

This court has considered each and every alleged deprivation of petitioner's constitutional rights, has independently reviewed the Magistrate's recommended disposition, has read the record of the proceedings before the Magistrate, and being otherwise duly advised, it is

ORDERED AND ADJUDGED as follows:

1) That Respondents' Objections to the Magistrate's Review and Recommendation be and the same are hereby OVERRULED.

2) That Petitioner's Objections to the Magistrate's Review and Recommendation be and the same are hereby OVERRULED.

3) That the Court will APPROVE AND ADOPT the Magistrate's Review and Recommendation as the Order of this Court, insofar as it is consistent with the Opinion herein.

4) That in all other respects the Magistrate's Review and Recommendation be and the same is hereby APPROVED AND ADOPTED as the Order of this Court.

5) That the Stay of Execution previously entered by this Court will be LIFTED and the Court's Order of June 25, 1979 will stand VACATED thirty (30) days from the date of this Order.

DONE AND ORDERED in Chambers in Fort Lauderdale, Florida, this 4th day of June, 1981.

U. S. DISTRICT JUDGE

Copies furnished counsel

FOOTNOTES

1/ The two mitigating circumstances are established by Judge Cowart in his findings:

> This Court is not unmindful of the fact that the defendant is but 26 years of age and is further not unmindful of the fact that this is the defendant's first conviction. (Trial Transcript at 1697).

APPENDIX C

Opinion of the United States District Court for the Southern District of Florida denying Petitioner's Motion for a New Trial, dated July 10, 1981.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO: 79-2721-CIV-JAG

ROBERT A. SULLIVAN,
Petitioner,

vs.

LOUIE L. WAINWRIGHT, etc., et al.,
Respondents.

_____/

O R D E R

THIS CAUSE has come before the court for review upon Petitioner's Motion for New Trial. The gravamen of the motion is the objection to the distinction this court found between the instant case and the case of Stephens v. Zant, 631 F.2d 397 (5th Cir. 1980), modified, No. 79-2407, slip op. at 8158 (5th Cir. June 18, 1981).

In its order of June 4, 1981 the court reasoned as follows:

> In the instant case, unlike Stephens, the jury did not consider the non-statutory aggravating factor. The petitioner's failure to display any remorse was only considered by the trial court in the written findings made pursuant to Fla. Stat. § 921.141(3). Moreover, the non-statuto y factor was not the sole factor considered by the court.

Petitioner now points out that unlike the Florida statute, the Georgia scheme provides that the jury in a jury trial, shall designate in writing the aggravating circumstances. Ga. Stat. § 27-2534.1 The death penalty may be imposed only if the jury (the judge in a non-jury trial) finds one of the statutory aggravating circumstances and then elects to impose that sentence.

The court, after re-examining Stephens again finds that there has been no violation of this petitioner's constitutional rights.

First, the court notes that the opinion in Stephens has been modified. The Fifth Circuit deleted the following language which appeared at 631 F.2d.406, column 2, line 10:

> The presence of the unconstitutionally vague circumstances also made it possible for the jury to consider several prior

> convictions of petitioner which otherwise would not have been before it.

In addition, the two sentences following the deleted portion have been modified to read as follows:

> The instruction on the invalid circumstance may have unduly directed the jury's attention to his prior convictions. It cannot be determined with the degree of certainty required in capital cases that the instruction did not make a critical difference in the jury's decision to impose the death penalty.

Thus the Stephens court held that where the instructions to the jury may have unduly directed their attention to an invalid circumstance, there is no means of determining with the requisite certainty, whether the improper instruction made the critical difference. The court did not rule unlawful the imposition of a death sentence where the trial court, in making its written findings, has used one impermissable factor in reaching its conclusion that "the aggravating circumstances in this case purely outweigh beyond and to the exclusion of every reasonable doubt in the Court's mind the mitigating circumstances." (Trial Transcript at 1697) (emphasis added).

Second, the court concurs in the Honorable George C. Carr's assessment of the Stephens decision as it applies to a death sentence imposed under the Florida statute.

> Under the Georgia statute involved in Stephens, the jury was not required to state what mitigating circumstances, if any, were considered; by contrast, under the Florida procedure the trial judge was (and is today) required to prepare written findings reciting both aggravating and mitigating circumstnaces. The Florida Supreme Court has repeatedly held that reversal of death sentences is not required merely because invalid aggravating circumstances are considered, even when coupled with a mitigating circumstance, so long as it can be known that the result of the weighing process would not have been different had the impermissable factors not been present. Johnny Paul Witt v. Louie L. Wainwright Case No. 80-545-Civ-T-GC, Memorandum Opinion, June 17, 1981 at 2. Citations omitted.

Third, the court notes that unlike the procedure in Georgia, a Florida trial court must issue written findings should the court conclude that the death penalty is appropriate; the jury acts in an advisory capacity. Fla. Stat. 921.141 This is

an additional safeguard to ensure that the sentencing authority's discretion has been channeled.

The court concludes that the sentencing judge's written findings demonstrate that he did not unduly direct his attention to the invalid circumstance. Moreover, this court finds, with the requisite degree in a capital case, that the non-statutory factor did not make "a critical difference" in the sentencing judge's conclusion that the death penalty was appropriate.

It is accordingly,

ORDERED AND ADJUDGED that Petitioner's Motion for New Trial be and the same is hereby DENIED on all of the grounds set forth in said motion.

DONE AND ORDERED in chambers at Fort Lauderdale, Florida this 10th day of July, 1981.

Jose A. Gonzalez, Jr.
UNITED STATES DISTRICT JUDGE

cc: all counsel

APPENDIX D

Opinion of the United States Court of Appeals for the Eleventh Circuit, dated January 17, 1983.

Robert A. SULLIVAN,
Petitioner-Appellant,

v.

Louie L. WAINWRIGHT, etc., et al.,
Respondents-Appellees.

No. 81-5843.

United States Court of Appeals,
Eleventh Circuit.

Jan. 17, 1983.

Rehearing and Rehearing En Banc
Denied May 17, 1983.

Appeal was taken from a judgment of the United States District Court for the Southern District of Florida, Jose A. Gonzalez, Jr., J., denying habeas corpus petition challenging conviction for first-degree murder and sentence of death. The Court of Appeals, Fay, Circuit Judge, held that: (1) petitioner was not denied his Sixth Amendment right to effective assistance of counsel at penalty phase or on direct appeal to state Supreme Court; (2) petitioner failed to demonstrate actual prejudice so as to be allowed to advance in federal court objection to trial judge's finding of lack of remorse where objection was barred from consideration in state court by valid state procedural rule; and (3) claim by petitioner with regard to prosecutor's intentional eliciting of testimony from state's only eyewitness that he had taken a polygraph did not raise an issue of constitutional or federal law; therefore, Court of Appeals was without jurisdiction to consider it.

Affirmed.

Tjoflat, Circuit Judge, concurred and filed opinion.

1. Criminal Law ⇐641.13(1)

Whether defense counsel has rendered adequate assistance is mixed question of law and fact that requires application of legal principles to historic facts of case.

2. Habeas Corpus ⇐113(12)

District court's conclusion on issue of whether defense counsel has rendered adequate assistance is entitled to no special deference, and Court of Appeals must review counsel's performance and determine independently whether constitutional standard was met. U.S.C.A. Const.Amend. 6.

3. Criminal Law ⇐641.13(1)

In assessing whether defense counsel's performance constituted "reasonably effective assistance," assistance rendered must be evaluated from perspective of counsel, taking into account all circumstances of case, but only as those circumstances were known to counsel at time.

4. Criminal Law ⇐641.13(1)

Each case turns on its own facts and effectiveness of counsel must also be judged on facts and conduct of those involved in each case.

5. Criminal Law ⇐641.13(2)

In light of totality of circumstances as known to counsel at time, counsel's performance at penalty phase did not fall below reasonably effective assistance standard.

6. Criminal Law ⇐641.13(7)

Failure of defense counsel to advance, on direct appeal to state supreme court, certain points which subsequently gained judicial recognition did not render counsel ineffective.

7. Habeas Corpus ⇐25.1(4)

Habeas petitioner failed to show cause for failure to raise at trial or on direct appeal objection to judge's excusal of prospective jurors who voiced reservations about imposing death penalty, and therefore because that issue was thereby barred from consideration in state court, the issue would not be considered on merits in federal court. 32 West's F.S.A. Florida Appellate Rules, rule 3.7, subd. i (1977).

8. Habeas Corpus ⇐25.1(6)

Allegations of ineffective assistance of counsel are insufficient to constitute requisite cause so as to allow advancement by habeas petitioner in federal court of those claims barred from consideration in state court by valid state procedural rule.

9. Habeas Corpus ⇐30(1)

Habeas petitioner failed to demonstrate that he was actually prejudiced by jury instructions given at trial, and therefore, because petitioner failed at trial and on direct appeal to raise the issue, so that the issue was barred by state procedural rule, petitioner could not advance the claim in federal court. West's F.S.A. Rules Crim. Proc., Rules 3.390(d); West's F.S.A. Rules App.Proc., Rule 3.7 subd. i (1977).

10. Habeas Corpus ⇐30(3)

Habeas petitioner failed to demonstrate that he was actually prejudiced by trial judge's finding of lack of remorse in imposing death penalty, and therefore because petitioner failed to raise that issue at trial or on direct appeal, so that it was barred under state rule of procedure, petitioner could not advance that issue in federal court. West's F.S.A. Rules App.Proc., Rule 3.7, subd. i (1977).

11. Habeas Corpus ⇐45.2(4)

Claim by habeas petitioner with regard to prosecutor's intentional eliciting of testimony from state's only eyewitness that he had taken a polygraph did not raise an issue of constitutional or federal law; therefore, Court of Appeals was without jurisdiction to consider it. 28 U.S.C.A. § 2254.

Roy E. Black, Miami, Fla., for petitioner-appellant.

Wallace E. Allbritton, Asst. Atty. Gen., Tallahassee, Fla., for respondents-appellees.

Appeal from the United States District Court for the Southern District of Florida.

Before RONEY, TJOFLAT and FAY, Circuit Judges.

FAY, Circuit Judge:

Robert A. Sullivan appeals the district court's denial of his habeas corpus petition challenging his conviction for first degree murder and sentence of death and raises five issues: 1) whether the death sentence was unconstitutionally imposed on the basis of the state trial court's findings or instructions to the jury; 2) whether petitioner Sullivan received ineffective assistance of counsel; 3) whether excusal of four prospective jurors for cause violated his constitutional right to a fair trial; 4) whether the testimony of a state witness regarding a polygraph constituted constitutional error; and, 5) whether the denial of petitioner's leave to amend was improper. After careful consideration of the issues raised on appeal, we affirm the denial of the writ of habeas corpus.

Facts

On the night of April 8, 1973, Sullivan, along with Reid McLaughlin, robbed a Howard Johnson's restaurant in Homestead, Florida, where Sullivan had formerly been employed. Sullivan and McLaughlin abducted the assistant manager, Donald Schmidt, taped his wrists behind his back, and drove him to a swampy area. Sullivan struck Schmidt twice on the back of the head with a tire iron and then shot him twice in the back of the head, each time with both barrels of a double barrel shotgun.

When Sullivan was arrested, the police found Schmidt's credit cards and watch. The police also found a shotgun, a handgun, white adhesive tape and a tire iron in Sullivan's car. Sullivan subsequently confessed to the murder of Schmidt and implicated McLaughlin. McLaughlin also confessed, but entered into a plea bargain with the state. McLaughlin was promised a life sentence in exchange for his testimony at Sullivan's trial.

Sullivan was convicted by a jury in Dade County, Florida in November 1973. The jury recommended a sentence of death and the state trial judge imposed the death penalty pursuant to Fla.Stat. § 921.141 (1973).

Sullivan appealed to the Florida Supreme Court, which affirmed. *Sullivan v. State*, 303 So.2d 632 (1974). The United States Supreme Court denied certiorari. *Sullivan v. Florida*, 428 U.S. 911, 96 S.Ct. 3226, 49 L.Ed.2d 1220 (1976). Sullivan, represented by new counsel, filed a motion in the state

court for post-conviction relief pursuant to Rule 3.850, Florida Rules of Criminal Procedure. The state court held an evidentiary hearing without Sullivan's presence on the sole issue of ineffective assistance of counsel. The court thereafter denied the motion. Sullivan appealed to the Florida Supreme Court. While that appeal was pending, the Governor of Florida signed a death warrant for Sullivan. The Florida Supreme Court denied Sullivan's motion for stay of execution and affirmed the denial of Sullivan's motion for post-conviction relief. *Sullivan v. State*, 372 So.2d 938 (Fla.1979).

Sullivan then filed a petition for writ of habeas corpus and motion for stay of execution pursuant to 28 U.S.C. § 2254 in the United States District Court for the Southern District of Florida. The district court granted the motion for stay of execution. The magistrate conducted an evidentiary hearing on Sullivan's habeas corpus petition. Sullivan testified and was given every opportunity to present evidence. After post-hearing submissions of briefs by the parties, the magistrate entered a lengthy report recommending that the petition for writ of habeas corpus be denied on its merits. State and Sullivan filed written objections to the magistrate's report and recommendation. The district court entered its Final Order of Dismissal on June 4, 1981, denying the petition for writ of habeas corpus. This appeal followed.

Ineffective Assistance of Counsel

On this appeal, Sullivan contends he was denied his sixth amendment right to the effective assistance of counsel at the penalty phase and on direct appeal to the Florida Supreme Court. The magistrate held an evidentiary hearing on the ineffective assistance of counsel claims,[1] and found that counsel was "reasonably likely to render and did render reasonably effective assistance of counsel," applying the standard enunciated in *MacKenna v. Ellis*, 280 F.2d 592, 599 (5th Cir.1960), *adhered to en banc*, 289 F.2d 928 (5th Cir.) *cert. denied*, 368 U.S. 877, 82 S.Ct. 121, 7 L.Ed.2d 78 (1961).[2] The district court concurred in the magistrate's conclusions and found that "petitioner's main claim that he was denied effective assistance of counsel [was] totally without merit. The record clearly demonstrate[d] that his counsel throughout discharged their grave and solemn duty to petitioner in a manner consistent with the highest technical and ethical standards of their profession." (R., Vol. III, p. 589, Final Order of Dismissal).

[1, 2] Whether defense counsel has rendered adequate assistance is a mixed question of law and fact that requires the application of legal principles to the historic facts of the case. *Cuyler v. Sullivan*, 446 U.S. 335, 341–42, 100 S.Ct. 1708, 1714, 64 L.Ed.2d 333 (1980); *Young v. Zant*, 677 F.2d 792, 798 (11th Cir.1982). The district court's conclusion on this issue is entitled to no special deference and this court must review counsel's performance and determine independently whether the constitutional standard was met. *Proffitt v. Wainwright*, 685 F.2d 1227 at 1247 (11th Cir. 1982), *citing*, *Washington v. Watkins*, 655 F.2d 1346, 1355 (5th Cir.1981). Similarly, the state courts' finding that Sullivan's ineffective assistance of counsel claim was without merit, *Sullivan v. State*, 372 So.2d at 939, is not entitled to a presumption of correctness under 28 U.S.C. § 2254(d). *Goodwin v. Balkcom*, 684 F.2d 794 at 803 (11th Cir.1982).

[3] We must assess whether counsel's performance constituted "reasonably effective assistance." The standard is not errorless counsel or counsel judged with the benefit of 20/20 hindsight. *Proffitt v. Wain-*

1. At this three day hearing, evidence was presented concerning Sullivan's pretrial representation by attorney Raymond Windsor, as well as Sullivan's representation through appeal by attorney Denis Dean.

2. As stated by the court:

> We interpret the right to counsel as the right to effective counsel. We interpret counsel to mean not errorless counsel, and not counsel judged ineffective by hindsight, but counsel reasonably likely to render and rendering reasonably effective assistance.
>
> 280 F.2d at 599.

wright, at 1247; *Mylar* v. *State*, 671 F.2d 1299, 1301 (11th Cir.1982). Rather, the assistance rendered must be evaluated from the perspective of counsel, taking into account all the circumstances of the case, but only as those circumstances were known to counsel at that time. *Proffitt v. Wainwright*, at 1247. Although on this appeal Sullivan only raises counsel's effectiveness during the penalty phase and on direct appeal to the Florida Supreme Court, a consideration of the totality of circumstances encompasses the quality of counsel's assistance from the time of appointment through the appeal. *Goodwin v. Balkcom*, 684 F.2d at 804 (11th Cir.1982).

[4, 5] Sullivan's contention that counsel rendered ineffective assistance at the penalty phase is based on his assertion that "it does not seem inappropriate to require counsel in a capital case to give an extensive and perhaps impassioned plea for his client's life." Brief of Appellant at 41. Sullivan also asserts that counsel did not make appropriate objections or sufficiently rebut the prosecutor's argument requesting the death penalty. We decline to adopt a rigid rule which would require counsel to argue to the jury in a specific manner or to make particular objections during the penalty phase of a capital case. Each case turns on its own facts and the effectiveness of counsel must also be judged on the facts and conduct of those involved in each case. *Goodwin v. Balkcom*, at 804. We have carefully reviewed counsel's performance during the penalty phase, in light of the totality of the circumstances as they were known to counsel at that time, and find that counsel's performance did not fall below the "reasonably effective assistance" standard.

[6] Sullivan also contends that counsel was ineffective because he did not raise certain issues on direct appeal to the Florida Supreme Court. Counsel did file a brief on appeal which argued and supported several substantive legal claims, such as the admission of testimony relating to a polygraph. This is not a situation similar to *Mylar v. Alabama*, 671 F.2d 1299, 1302 (11th Cir.1982), where we held that failure to file a brief in a nonfrivolous appeal falls below the standard of competency expected and required of counsel in criminal cases and therefore constitutes ineffective assistance of counsel.[3] Sullivan's appellate counsel functioned as an active advocate on behalf of his client. *Anders v. California*, 386 U.S. 738, 744, 87 S.Ct. 1396, 1400, 18 L.Ed.2d 493 (1967). The failure of counsel, in 1974, to advance certain points on appeal which subsequently gained judicial recognition does not render counsel ineffective. Sullivan acknowledges that he was one of the first defendants to be tried under Florida's post-*Furman* death penalty statute. At the time of trial and appeal in 1973–74, the law concerning capital sentencing was in a state of reformation. Sullivan does not direct us to any case decided at that time and overlooked by counsel. Counsel's failure to divine the judicial development of Florida's capital sentencing does not constitute ineffective assistance of counsel. *Accord, Proffitt v. Wainwright*, supra.

Thus, we find that Sullivan received reasonably effective assistance of counsel during the penalty phase and on direct appeal.

Sullivan's Substantive Constitutional Claims

Sullivan argues that his trial, including the penalty phase, contained the following errors which render the imposition of the death penalty unconstitutional. Sullivan contends that four prospective jurors who voiced reservations about imposing the death penalty were excused by the trial judge in violation of *Witherspoon v. Illinois*, 391 U.S. 510, 88 S.Ct. 1770, 20 L.Ed.2d 776 (1968). Sullivan asserts that during the penalty phase, the state prosecutor's remarks and trial court's jury instructions allowed the jury's consideration of non-statutory aggravating factors contrary to *Songer v. State*, 365 So.2d 696 (Fla.1978) and

3. *See also, Passmore v. Estelle*, 607 F.2d 662 (5th Cir.1979); *Passmore v. Estelle*, 594 F.2d 115 (5th Cir.1979).

limited the jury's consideration on non-statutory mitigating factors in violation of *Lockett v. Ohio*, 438 U.S. 586, 98 S.Ct. 2954, 57 L.Ed.2d 973 (1978). Sullivan further contends that the trial judge's findings rendered pursuant to Fla.Stat. § 921.141(3) (1973) impermissibly relied upon a non-statutory aggravating factor.

Throughout the federal habeas corpus proceedings, the state has maintained that consideration of the above claims is barred by *Wainwright v. Sykes*, 433 U.S. 72, 97 S.Ct. 2497, 53 L.Ed.2d 594 (1977). In *Sykes*, the United States Supreme Court held that a habeas corpus petitioner must show "cause and prejudice" in order to advance in federal court those claims barred from consideration in the state courts by a valid state procedural rule.

It is clear from the record that there was no objection at trial to the judge's excusal of any of the prospective jurors on *Witherspoon* grounds, nor was this issue raised on direct appeal. It is also clear that there was no objection to the jury instructions given at trial nor was this issue raised on direct appeal. The correctness of the trial judge's findings in imposing the death penalty was also not raised on direct appeal. Florida's rules of procedure provided that assignments of error not argued in the brief would be deemed abandoned [4] and specifically provided that jury instructions must be objected to before the jury retired to consider its verdict.[5] In the subsequent motion for post conviction relief pursuant to Florida Rules of Criminal Procedure, Rule 3.850, Sullivan did raise the *Witherspoon* issue as well as attacking both the jury instructions and the trial judge's findings. The Florida courts held that consideration of the issues not raised on direct appeal was procedurally barred.[6]

Because the state court declined to consider the constitutional claims because of valid state procedural rules, Sullivan must satisfy the "cause and prejudice" test of *Sykes*. This requirement was recently reaffirmed by the United States Supreme Court in *Engle v. Isaac*, 456 U.S. 107, 102 S.Ct. 1558, 71 L.Ed.2d 783 (1982), which unequivocably stated that "any prisoner bringing a constitutional claim to the federal courthouse after state procedural default must demonstrate cause and actual prejudice before obtaining relief." 456 U.S. at 129, 102 S.Ct. at 1572. We therefore agree with the state that Sullivan must show cause and prejudice for the state procedural default before his contentions are considered on the merits. Sullivan, however, has not addressed the *Sykes* issue nor has he advanced *any* cause for the procedural default nor proffered *any* prejudice resulting therefrom. Although the burden is on the petitioner in a habeas corpus proceeding, including the burden to satisfy *Sykes*, *Nettles v. Wainwright*, 677 F.2d 410, 413 n. 2 (5th Cir.1982) [7] we nevertheless will consider whether the requirements of *Sykes* and *Isaac* have been met.

4. Florida Rules of Appellate Procedure, Rule 3.7(i) (1973) provided:

> Such assignments of error as are not argued in the briefs will be deemed abandoned and may not be argued orally. However, the Court, in the interest of justice, may notice jurisdictional or fundamental error apparent in the record-on-appeal, whether or not it has been argued in the briefs or made the subject of an assignment of error or of an objection or exception in the court below.

5. Florida Rules of Criminal Procedure, Rule 3.390(d) (1973) provided:

> No party may assign as error grounds of appeal the giving or the failure to give an instruction unless he objects thereto before the jury retires to consider its verdict, stating distinctly the matter to which he objects, and the grounds of his objection. Opportunity shall be given to make the objection out of the presence of the jury.

6. The Florida Supreme Court stated:

> Sullivan seeks review of twelve issues that were alleged in his [3.850] motion before the trial court. Eleven of these issues were raised or could have been raised in Sullivan's first appeal to this Court. These matters will not support a collateral attack.
>
> The remaining issue alleges ineffective assistance of counsel. [citations omitted]

Sullivan v. State, 372 So.2d 938 (1979).

7. *Nettles* was decided by a Unit B panel of the Former Fifth Circuit and is binding precedent absent Eleventh Circuit en banc consideration. *Stein v. Reynolds Securities*, 667 F.2d 33 (11th Cir.1982).

[7] The procedural default on the *Witherspoon* issue is most easily resolved. On appeal, Sullivan does not contend that his counsel was ineffective during the jury selection process. Further, the 1968 decision in *Witherspoon* was not novel in 1973 nor would it have been futile to present a *Witherspoon* issue to the state courts. Thus, we find that Sullivan has not shown cause for the procedural default on the *Witherspoon* issue and its consideration on the merits is barred by *Sykes* and *Isaac*.[8]

[8] The procedural default regarding the state trial court's jury instructions and sentencing findings presents a more complicated situation under *Sykes*. The magistrate did not apply *Sykes'* cause and prejudice test because Sullivan raised the jury instruction and sentencing findings issues in conjunction with allegations of ineffective assistance of counsel. However, in *Washington v. Estelle*, 648 F.2d 276 (5th Cir. 1981), the Fifth Circuit[9] reiterated that "an allegation of ineffective assistance of counsel is not sufficient to satisfy the 'cause' requirement." *Id.* at 278, *citing*, *Lumpkin v. Ricketts*, 551 F.2d 680 (5th Cir.1977), *cert. denied*, 434 U.S. 957, 98 S.Ct. 485, 54 L.Ed.2d 316 (1977). Allegations of ineffective assistance of counsel are insufficient to constitute the requisite cause. Similarly, the "futility of presenting an objection to the state courts cannot alone constitute cause for a failure to object at trial." *Engle v. Isaac*, 456 U.S. at 130, 102 S.Ct. at 1572. However, *Isaac* did not resolve whether

> the novelty of a constitutional claim ever establishes cause for a failure to object. We might hesitate to adopt a rule that would require trial counsel either to exercise extraordinary vision or to object to every aspect of the proceedings in the hope that some aspect might make a latent constitutional claim. On the other hand, later discovery of a constitutional defect unknown at the time of trial does not invariably render the trial fundamentally unfair.

456 U.S. 131, 102 S.Ct. at 1573. The Court in *Isaac* found that the basis of the constitutional claim was available and that other defense counsel had perceived and were litigating the constitutional claim, and thus the cause prong of *Sykes* was not satisfied. Although the burden is on Sullivan to show that there is sufficient cause under *Sykes* to excuse the procedural default, we cannot be positive that the relative novelty of Sullivan's claims in 1973 would not excuse the default. We therefore consider whether Sullivan has satisfied the prejudice prong of *Sykes*.

[9] Regarding the trial court's jury instructions, Sullivan must show that the alling instruction so infected the entire trial that the conviction, or in Sullivan's case, the sentence, violates due process. *United States v. Frady*, 456 U.S. 152, 167–68, 102 S.Ct. 1584, 1594, 71 L.Ed.2d 816 (1982), *quoting*, *Henderson v. Kibbe*, 431 U.S. 145, 154, 97 S.Ct. 1730, 1736, 52 L.Ed.2d 203 (1977). Sullivan has not shown that the jury was denied the use of any nonstatutory mitigating factors or did use any nonstatutory aggravating factors in deciding to recommend the death penalty. Sullivan has not sustained his burden and we cannot say that the jury instructions so infected the sentencing phase of the trial that the actual prejudice test is met. We therefore conclude that the lack of showing of actual prejudice under *Sykes* bars our consideration of the merits of Sullivan's claims regarding the jury instructions.

8. Because we find that Sullivan has not shown cause for the procedural default, we need not consider whether Sullivan suffered actual prejudice. As noted by the Court in *Isaac*, *Sykes* "stated these criteria in the conjunctive," 456 U.S. at 134, n. 43, 102 S.Ct. at 1575, n. 43, and a conclusion of lack of cause moots the inquiry regarding prejudice.

9. In *Bonner v. City of Prichard*, 661 F.2d 1206 (11th Cir.1981) (en banc), this court adopted as binding precedent all of the decisions of the former Fifth Circuit handed down prior to the close of business on September 30, 1981. *Washington v. Estelle* was decided June 16, 1981.

[10] Sullivan also contends that the trial judge's finding of lack of remorse constitutes impermissible reliance upon a nonstatutory aggravating factor. In order for this court to properly consider Sullivan's contention on its merits, we must find the existence of cause and prejudice for the procedural default. We find that Sullivan has not sustained his burden of showing actual prejudice under *Sykes*. The trial judge did not denominate lack of remorse as an aggravating factor, but noted it in his findings. After discussing the fact that the murder was committed in the course of an armed robbery and for pecuniary gain the trial judge stated that "these facts alone in the Court's judgment could justify the imposition of the death penalty.[10]

Thus, we find that we are barred under *Wainwright v. Sykes* from considering the merits of Sullivan's claims of constitutional error because Sullivan has not shown cause and prejudice for his procedural defaults in state court.

The Polygraph

[11] Sullivan argues that the prosecutor's intentional eliciting of testimony from Reid McLaughlin, the state's only eyewitness, that he had taken a polygraph, violated Sullivan's sixth and fourteenth amendment rights. We do not agree.

10. The full text of the trial judge's findings is as follows:

This Court independent of, but in agreement with, the advisory sentence rendered by the jury does hereby impose the death penalty upon the defendant, ROBERT AUSTIN SULLIVAN, and in support thereof as required by 921.141(3), submits this, its written findings upon which the sentence of death is based. These findings are as follows:

1. That sufficient aggravating circumstances exist in this particular case that far outweigh any mitigating circumstances in the Record. The death of this decedent occurred while the defendant was engaged in the commission of the crime of armed robbery. In addition thereto, the capital felony was committed for pecuniary gain, as the decedent had been robbed of his personal possessions as well as the possession of the company he represented. These facts alone in this Court's judgment could justify the imposition of the death penalty, but this particular killing is far more useless and heinous than these.

2. The Court finds that the capital felony committed in this case was especially heinous, atrocious and cruel. The Supreme Court of Florida in consideration of the legalities of the recently enacted death sentence in the State of Florida decreed that these terms were to receive their common connotations and decreed that "heinous" meant "extremely wicked or shockingly evil," "atrocious" meant "outrageously wicked and vile" and "cruel" meant "a design to inflict a high degree of pain with utter indifference to or even enjoyment of the suffering of others." *See State v. Dixon*, 283 So.2d 1, pg. 9, Florida Supreme Court, 1973. This Court cannot conceive of the commission of a crime that is more vividly described by these words as set forth by the Supreme Court than the one at bar. The defendant in this case saw fit to braggadociously state that he wanted to commit a "crime" which in his mind was to be "the perfect crime." The decedent was bound with hands behind his body with adhesive tape, mentally toyed with by the defendant as to operating and management techniques of the establishment where he worked, a place where the defendant himself had previously been employed. After this mental exercise, the decedent was led to a lonely spot in Dade County with hands still behind him and as he stumbled in the darkness, struck from behind with a tire iron, and then again from behind, while on the ground in a total helpless position, was mortally wounded with four blasts from a .12 gauge shotgun to the back of the head. This Court cannot conceive of a more conscienceless crime.

3. This Court has observed the demeanor and the action of the defendant throughout this entire trial and has not observed one scintilla of remorseness displayed, indicating fullwell to this Court that the death penalty is the proper selection of the punishment to be imposed in this particular case.

This Court is not unmindful of the fact that the defendant is but 26 years of age and is further not unmindful of the fact that this is the defendant's first conviction. However, the aggravating circumstances in this case purely outweigh beyond and to the exclusion of every reasonable doubt in the Court's mind the mitigating circumstances. This Court does impose the death penalty upon the defendant ROBERT AUSTIN SULLIVAN. (R. 1694-1697).

We refuse to elevate form over substance and hold that because the discussion of remorse is contained in a numbered paragraph it must be an aggravating factor. This is especially true because the burden is on Mr. Sullivan to show actual prejudice under *Sykes*.

The Supreme Court of Florida considered the testimony with reference to the polygraph and found that although results are not admissible as a matter of state law, *Kaminski v. State*, 63 So.2d 339 (Fla.1952), the comment in this case was harmless error. *Sullivan v. State*, 303 So.2d at 634–5. Yet because the polygraph reference may have been inadmissible as a matter of state law, does not mean the issue is reviewable by this court on a federal habeas corpus petition. Federal courts may grant relief to a state prisoner "only on the ground that he is in custody in violation of constitution or laws or treaties of the United States." 28 U.S.C. § 2254.

We find that Sullivan's claim with regard to the polygraph does not raise an issue of constitutional or federal law, and we do not have jurisdiction to consider it.

Conclusion

The only other issue Sullivan raises on appeal is the denial of his motion to amend the habeas corpus petition. We find this contention totally devoid of merit.

The district court's denial of the petition for habeas corpus is AFFIRMED.

TJOFLAT, Circuit Judge, concurring:

I agree with the court's disposition of this appeal, but I write separately to express the following concern.[1] I believe the majority has misapplied *Sykes* by deciding on the merits the cause prong of the cause and prejudice test. The majority recognizes that Sullivan has failed to allege or prove any cause for his procedural defaults in state court. The majority also realizes that the petitioner has the burden of proving cause. Nevertheless, the majority decides the cause issue on the merits.

We should not address the merits of the cause issue because resolution of that issue requires a factual determination, *i.e.*, why did counsel fail to raise his claims timely in state court. This court cannot engage in this factual inquiry and has no business speculating on it. The majority treats the question of cause as purely one of law, and asks the abstract question whether counsel should have been aware of his "relatively novel" constitutional claims. I submit that it is irrelevant what this court thinks about the novelty of petitioner's claims. To reiterate, the question is why petitioner's counsel did not raise these issues in state court when he should have. We cannot answer this question because we are not a trial court, and we cannot ascertain facts not patent from the record. The majority appears to realize that, but nevertheless decides to speculate why there was a procedural default. Such speculation is obviously not part of our appellate function. Therefore, I cannot join with the majority in engaging in it. I would hold that Sullivan has failed to prove cause and thus *Sykes* bars those claims on which there has been a state procedural default.[2]

1. I also note, consistent with the majority opinion, that in arguing that the trial sentencer impermissibly considered a nonstatutory aggravating circumstance, Sullivan does not also attack the Florida Supreme Court's affirmance of his allegedly invalid sentence. Therefore, we need not address such an attack.

2. I do not mean to imply that the prejudice prong of the *Sykes* test does not involve a factual determination. The factual inquiry under this prong can be determined, however, from the record of the state court trial alone. Thus, an appellate court may engage in this inquiry without the benefit of additional evidence. In determining cause, however, the record usually will not reflect the reasons for a procedural default. When the record is unhelpful, as in this case, appellate courts should not engage in hypothetical discussions of cause.

APPENDIX E

Florida Statutes, Section 921.141

Florida Statutes, Section 921.141

921.141 Sentence of death or life imprisonment for capital felonies; further proceedings to determine sentence

(1) Separate proceedings on Issue of penalty.--Upon conviction or adjudication of guilt of a defendant of a capital felony, the court shall conduct a separate sentencing proceeding to determine whether the defendant should be sentenced to death or life imprisonment as authorized by s. 775.082. The proceeding shall be conducted by the trial judge before the trial jury as soon as practicable. If, through impossibility or inability, the trial jury is unable to reconvene for a hearing on the issue of penalty, having determined the guilt of the accused, the trial judge may summon a special juror or jurors as provided in chapter 913 to determine the issue of the imposition of the penalty. If the trial jury has been waived, or if the defendant pleaded guilty, the sentencing proceeding shall be conducted before a jury impaneled for that purpose, unless waived by the defendant. In the proceeding, evidence may be presented as to any matter that the court deems relevant to the nature of the crime and the character of the defendant and shall include matters relating to any of the aggravating or mitigating circumstances enumerated in subsections (5) and (6). Any such evidence which the court deems to have probative value may be received, regardless of its admissibility under the exclusionary rules of evidence, provided the defendant is accorded a fair opportunity to rebut any hearsay statements. However, this subsection shall not be construed to authorize the introduction of any evidence secured in violation of the Constitution of the United States or the Constitution of the State of Florida. The state and the defendant or his counsel shall be permitted to present argument for or against sentence of death.

(2) Advisory sentence by the jury.--After hearing all the evidence, the jury shall deliberate and render an advisory sentence to the court, based upon the following matters:

(a) Whether sufficient aggravating circumstances exist as enumerated in subsection (5);

(b) Whether sufficient mitigating circumstances exist which outweigh the aggravating circumstances found to exist; and

(c) Based on these considerations, whether the defendant should be sentenced to life imprisonment or death.

(3) Findings in support of sentence of death.--Notwithstanding the recommendation of a majority of the jury, the court, after weighing the aggravating and mitigating circumstances, shall enter a sentence of life imprisonment or death, but if the court imposes a sentence of death, it shall set forth in writing the findings upon which the sentence of death is based as to the facts:

(a) That sufficient aggravating circumstances exist as enumerated in subsection (5), and

(b) That there are insufficient mitigating circumstances to outweigh the aggravating circumstances.

In each case in which the court imposes the death sentence, the determination of the court shall be supported by specific written findings of fact based upon the circumstances in subsections (5) and (6) and upon the records of the trial and the sentencing proceedings. If the court does not make the findings requiring the death sentence, the court shall impose sentence of life imprisonment in accordance with s. 775.082.

(4) Review of judgment and sentence.--The judgment of conviction and sentence of death shall be subject to automatic review by the Supreme Court of Florida within sixty (60) days after certification by the sentencing court of the entire record, unless the time is extended for an additional period not to exceed thirty (30) days by the Supreme Court for good cause shown. Such review by the Supreme Court shall have priority over all other cases and shall be heard in accordance with rules promulgated by the Supreme Court.

(5) Aggravating circumstances.--Aggravating circumstances shall be limited to the following:

(a) The capital felony was committed by a person under sentence of imprisonment.

(b) The defendant was previously convicted of another capital felony or of a felony involving the use or threat of violence to the person.

(c) The defendant knowingly created a great risk of death to many persons.

(d) The capital felony was committed while the defendant was engaged, or was an accomplice, in the commission of, or an attempt to commit, or flight after committing or attempting to commit, any robbery, rape, arson, burglary, kidnapping, or aircraft piracy or the unlawful throwing, placing, or discharging of a destructive device or bomb.

(e) The capital felony was committed for the purpose of avoiding or preventing a lawful arrest or effecting an escape from custody.

(f) The capital felony was committed for pecuniary gain.

(g) The capital felony was committed to disrupt or hinder the lawful exercise of any governmental function or the enforcement of laws.

(h) The capital felony was especially heinous, atrocious, or cruel.

(i) The capital felony was a homicide and was committed in a cold, calculated, and premeditated manner without any pretense of moral or legal justification.

(6) Mitigating circumstances.--Mitigating circumstances shall be the following:

(a) The defendant has no significant history of prior criminal activity.

(b) The capital felony was committed while the defendant was under the influence of extreme mental or emotional disturbance.

(c) The victim was a participant in the defendant's conduct or consented to the act.

(d) The defendant was an accomplice in the capital felony committed by another person and his participation was relatively minor.

(e) The defendant acted under extreme duress or under the substantial domination of another person.

(f) The capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired.

(g) The age of the defendant at the time of the crime.

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NO. 83-5267 ORIGINAL

IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, NINETEEN HUNDRED AND EIGHTY-THREE

ROBERT AUSTIN SULLIVAN,

Petitioner,

-v-

LOUIE L. WAINWRIGHT,

Respondent.

On Petition for a Writ of Certiorari
To the United States Court of Appeals
For the Eleventh Circuit

BRIEF FOR RESPONDENT IN OPPOSITION

JIM SMITH
Attorney General

WALLACE E. ALLBRITTON
Assistant Attorney General

COUNSEL FOR RESPONDENT

QUESTIONS PRESENTED

I. WHETHER PETITIONER RECEIVED INEFFECTIVE ASSISTANCE OF COUNSEL AT THE PENALTY PHASE OF HIS CAPITAL TRIAL.

II. WHETHER THE LOWER COURT ERRED IN CONCLUDING THAT IT WAS BARRED FROM CONSIDERING THE MERITS OF PETITIONER'S CLAIMS REGARDING JURY INSTRUCTIONS ON THE BASES OF (1) PROCEDURAL DEFAULT AND (2) FAILURE TO SATISFY THE "CAUSE AND PREJUDICE" REQUIREMENT OF Wainwright v. Sykes, 433 U.S. 72 (1977).

III. WHETHER THE "ESPECIALLY HEINOUS, ATROCIOUS, AND CRUEL" AGGRAVATING FACTOR WAS PROPERLY APPLIED TO PETITIONER'S CASE.

IV. WHETHER THE LOWER COURT ERRED IN DETERMINING THAT THE REFERENCE TO A POLYGRAPH TEST BY A STATE WITNESS WHICH WAS DEEMED HARMLESS ERROR UNDER STATE LAW DOES NOT PRESENT AN ISSUE OF CONSTITUTIONAL OR FEDERAL LAW COGNIZABLE IN A FEDERAL HABEAS CORPUS PROCEEDING.

TABLE OF CONTENTS

TABLE OF CITATIONS

Other

OPINIONS BELOW

Petitioner's allegations designating the opinions below are correct and acceptable to respondents.

JURISDICTION

Petitioner's jurisdictional allegations are acceptable to respondents.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Respondents accept the constitutional and statutory provisions involved as set forth on p. 2 of the Petition.

PRELIMINARY STATEMENT

References to the Appendix attached to the Petition will be made by the symbol "PA" followed by appropriate page number. References to the appendix attached to this brief in opposition will be made by the symbol "RA" followed by appropriate page number. The record references in respondents' appendix are to the transcript of evidentiary hearing held in the federal district court which is being submitted under separate cover to this Court as Respondents' Exhibit 1.

STATEMENT OF THE CASE

A. Course of Proceedings

Petitioner was convicted of first-degree murder on November 8, 1973 and sentenced to death November 12, 1973. Following his conviction and sentence in the Circuit Court of Dade County, Florida, petitioner appealed to the Supreme Court of Florida. The four issues raised on this appeal were:

> Point I
>
> Whether or not the trial court erred in denying defendant's Motion for Mistrial upon the State's witness referring to a polygraph test;
>
> Point II
>
> Whether the trial court erred in admitting into evidence an enlarged photograph of the victim in view of the fact that all issues pertaining to relevancy of the photograph had been stipulated between counsel;
>
> Point III
>
> Whether the arrest of Robert Sullivan was legal and the subsequent seizure of tangible evidence and a confession lawful;
>
> Point IV
>
> Whether the provisions of Chapter 72-724, Laws of Florida, 1972, amending Florida Statutes, Sections 775.082, 782.04 and 921.141:
>
> 1. Is cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments to the Constitution of the United States?
>
> 2. Is an arbitrary infliction of punishment as to deprive the defendant of life, liberty or property without due process of law?
>
> 3. Is a denial of the right to a jury trial insured by the Sixth Amendment of the United States Constitution?
>
> 4. Is unconstitutional by embracing more than one subject therein?

Petitioner's conviction and sentence was affirmed on November 27, 1974. Sullivan v. State, 303 So.2d 632 (Fla. 1974).

Petitioner then filed a petition for writ of certiorari in this Court which presented two questions:

1. Whether the imposition and carrying out of the sentence of death for the crime of first degree murder under the law of Florida violates the Eighth or Fourteenth Amendment to the Constitution of the United States?

2. Whether a prosecutor's knowing, calculated and intentional introduction at a criminal trial in the jury's presence of manifestly inadmissible and prejudicial testimony suggesting that a state's witness has taken and passed a polygraph test is "harmless error" under the due process clause of the Fourteenth Amendment in a capital case where petitioner was subsequently convicted and sentenced to death?

The petition was denied by this Court on July 6, 1976, Sullivan v. Florida, 428 U.S. 911 (1976), reh.denied, 429 U.S. 873 (1976).

More than two years passed before petitioner on March 15, 1979, filed a motion to vacate, set aside or correct sentence pursuant to Rule 3.850, Florida Rules of Criminal Procedure. The motion to vacate was denied by the trial court on May 15, 1979, and affirmed on appeal to the Florida Supreme Court. Sullivan v. State, 372 So.2d 938 (Fla. 1979).

The Governor of Florida on June 19, 1979, signed a warrant directing that petitioner's execution take place on June 27, 1979.

The district court entered an order staying petitioner's execution and referred the matter to a magistrate for evidentiary hearing. Following a two-day plenary hearing the magistrate filed a lengthy review and recommendation recommending that the district judge deny the petition for writ of habeas corpus on the merits. (PA-2a-120a) By order dated June 4, 1981, the district court approved and adopted the magistrate's review and recommendation and lifted the stay of execution previously entered on June 25, 1979, effective thirty days from the date of the order. (PA-122a-130a)

On appeal, the Eleventh Circuit rejected petitioner's claim of ineffective assistance, specifically finding that he received reasonably effective assistance of counsel during the penalty phase and on direct appeal, rejecting all substantive constitutional claims. However, the Eleventh Circuit by order filed June 16, 1983, granted petitioner's motion for stay of execution "pending an application for writ of certiorari" without giving respondent an opportunity to move in opposition thereto. The petition for writ of certiorari was filed in this Court on August 15, 1983, thus automatically lifting the stay of execution previously entered by the court below.

B. Statement of the Facts

On April 10, 1973, at approximately 9:00 a.m., the body of Donald Schmidt was found by two hunters in a remote marshy area in the western part of Dade County, Florida. The Dade County Public Safety Department responded to the scene and Sergeant Arthur Felton of that department testified that the body was face down with the hands bound behind the back with white surgical tape, one shoe was missing, and there was a large wound to the back of the victim's head (Tr. 1240-1242, 1245).[1]

Frank Barden, the manager of the Howard Johnson's restaurant in Homestead, Florida, where Donald Schmidt was the assistant manager, testified that he last saw Schmidt at approximately 9:00 p.m. on April 8, 1973, at the restaurant. Barden said that at approximately 11:15 p.m., he called the restaurant and talked to Schmidt advising Schmidt to meet him at a Holiday Inn when Schmidt was finished with his bookkeeping for the night (Tr. 1215, 1216).

---

[1] References are to the record of state trial proceedings.

At midnight, Barden went back to the restaurant and saw Schmidt's car there; however, there were no lights on in the building which was of some concern to him since safety lights were always left on. Barden entered the restaurant, opened the bottom half of a floor safe Schmidt had access to and found that it was empty. He testified that approximately $2700 was missing (Tr. 1217-1219).

During the course of the investigation after the discovery of Schmidt's body, the name of Robert Sullivan came to the attention of Sergeant Felton as a person who had previously worked at the Howard Johnson's restaurant. Sergeant Felton also received information that a person matching Robert Sullivan's description was using a Master Charge credit card of the victim at various Miami stores.

Sergeant Felton obtained information that Sullivan often hung out at Keith's Cruise Lounge in Hallendale, Broward County, Florida. On April 17, 1973, Sergeant Felton, together with three other Dade County Public Safety Department detectives in two cars, went to that location. Prior to going to Keith's Cruise Lounge, Sergeant Felton obtained knowledge about outstanding felony warrants from New Hampshire where Sullivan had been prior to coming to Miami (Tr. 1256).

The detectives arrived at the lounge at approximately 12:00 a.m., and shortly thereafter observed a Cadillac previously described as having belonged to Robert Sullivan and a person whom they believed to be Robert Sullivan exit from the car, together with two other individuals. The three individuals remained in the lounge for approximately three hours after which time Sullivan and the others exited, stood talking in the parking lot for fifteen or twenty minutes, got back in the car and headed toward Miami (Tr. 1331-1335).

The lounge was approximately five or six blocks from the Dade County line, and the car was stopped by Sergeant Felton four or five blocks south of the Dade-Broward County line. Sergeant Felton testified that he stopped the car to arrest Robert Sullivan on the outstanding felony warrants from New Hampshire and so advised Sullivan upon stopping the car (Tr. 1256, 1257).

There were various items in the automobile seized which the state introduced at the trial of Robert Sullivan, including a shotgun, a handgun, white adhesive tape, and other items which the state argued could have been used in the robbery and subsequent murder of Donald Schmidt (Tr. 1262, 1263).

Also introduced into evidence was a watch Sullivan was wearing at the time of his arrest which had belonged to the victim and two credit cards belonging to the victim found in Sullivan's wallet after his arrest (Tr. 1264, 1265).

After Sullivan's arrest, Sergeant Felton advised him of his rights and subsequently took him to the Public Safety Department building, the result of which was a "confession" from Sullivan (Tr. 1253, 1254, 1279). At the time of Sullivan's arrest, there were two other individuals in the car, one being George Jackson and the other Reid McLaughlin. George Jackson was eventually released by the police (Tr. 1339, 1340). After being confronted with Sullivan's "confession", McLaughlin "confessed," implicating Sullivan and was also charged with first-degree murder and robbery.

In petitioner's statement which was introduced at trial (Tr. 1279, 1289), petitioner admitted that Reid McLaughlin and he went to the Homestead Howard Johnson's on the night of April 8, 1973, with the intention of robbing it, that McLaughlin and he counted the customers and employees as they left until they were certain the assistant manager, Donald Schmidt, was inside alone. Petitioner and McLaughlin entered through the back door

and held the assistant manager at gunpoint while the money was taken from the safe. McLaughlin taped Schmidt's hands behind him as petitioner drove to a deserted and swampy area of Dade County. Petitioner and McLaughlin planned to "dispose" of Schmidt by murdering him (Tr. 1288). Upon arriving at a desolate place the victim was removed from the car. When he stumbled, petitioner struck him twice on the head with a tire iron, and taking the shotgun that McLaughlin was carrying, shot him four times in the head. Petitioner and McLaughlin then took Schmidt's watch and credit cards and used the cards several times in Dade County (Tr. 1287-1289).

McLaughlin was the state's chief witness against petitioner. Prior to petitioner's trial, he had agreed to plead nolo contendere to a second degree murder charge in return for a life sentence and his testifying against petitioner. McLaughlin testified that petitioner and he had discussed committing "[t]he perfect crime" (Tr. 1360), and had determined to rob the Howard Johnson restaurant where petitioner had once served as assistant manager (Tr. 1362). McLaughlin entered the restaurant, ordered food, and counted the customers and employees. He and petitioner waited until all of these persons had left except the assistant manager and then entered and held Donald Schmidt at gunpoint. McLaughlin took his jewelry and wallet, and petitioner took the cash from the safe. The two then abducted Schmidt in petitioner's car. McLaughlin taped Schmidt's hands behind him, and since "[h]e was looking kind of worried, . . . I said, 'don't worry about it, and we will leave you in the woods and tie you up.'" (Tr. 1376) McLaughlin then described how he and petitioner stopped the car in a swampy area and led Schmidt away, how petitioner hit Schmidt on the head twice with a tire iron, and how he gave petitioner the shotgun (Tr. 1377, 1378). McLaughlin testified that he then started to walk away and heard petitioner fire the shotgun four

> The remaining issue alleges ineffective assistance of counsel. After an evidentiary hearing, the trial court, in denying Sullivan's motion said:
>
> > I have seen some frivolous motions come down the pike, but this has got to take the cake. On the ground of inadequacy of counsel, the motion to vacate is denied.
>
> The transcript of the 3.850 hearing supports this conclusion of the trial court.

Id. at 939. The court then went on to hold that petitioner's claim of ineffective assistance of counsel was without merit.

The magistrate made a thorough review of petitioner's allegations of ineffective assistance of counsel, setting forth in her review and recommendation each of the allegations of ineffective assistance as to Mr. Dean and then proceeded to refute every allegation so raised. The concluding remarks of the magistrate on this issue merit repeating:

> In support of this determination, this Court does not rely upon the petitioner's representation by Mr. Dean subsequent to the petitioner's trial and appeal but must point out, without objection or demurrer by the petitioner, Mr. Dean represented the petitioner, in whole or in part, for approximately five years in legal proceedings before the United States Supreme Court, in a class action suit, before the Parole Board in 1976, and in 1977 clemency proceedings. Although the five year time span is less in the case at bar than the 17 year span in that of Fitzgerald v. Estelle, supra, the petitioner's failure to complain for an extended period of time to authorities with power to act on his complaints must reduce to some degree the credence to be given to the petitioner's position. An exceedingly detailed examination of the entire record and of the testimony given at hearing by Judge Cowart and Judge Gable convinces this Court that Mr. Dean's representation of the petitioner met and even exceeded the standard of reasonably effective assistance of counsel.

Id. at PA 55a, 56a.

The district judge agreed with the conclusions reached by the magistrate. The following quoted from the Final Order of Dismissal is worthy of review:

> This court can add nothing to the thorough, complete and exhaustive discussion of the facts and the law contained in Judge Kyle's review and recommendation.
>
> It will be adopted in its entirety and hereinafter made the Order of this Court except as hereinabove modified with respect to respondents' second objection to said Review.
>
> This court's independent de novo review of the record of these proceedings convinces it that petitioner's main claim that he was denied effective assistance of counsel is totally without merit.

(P.A. 129a)

The Eleventh Circuit reviewed petitioner's claim of ineffective assistance, concluding that "Sullivan received reasonably effective assistance of counsel during the penalty phase and on direct appeal." Sullivan v. Wainwright, 695 F.2d 1306, 1309 (11th Cir. 1983).

Petitioner's claim of ineffective assistance of counsel at the sentencing stage is bottomed on an alleged failure to adequately develop certain evidence regarding a nonstatutory mitigating factor. Apparently petitioner is claiming that his counsel, Mr. Dean, failed to introduce in evidence the letters of Drs. Reichenberg and Corwin. See Petition, at pp. 6-8. Petitioner's counsel had occasion to contemplate use of the defense of insanity. However, after reviewing the reports of Drs. Reichenberg and Corwin, any theory of an insanity-type defense was discarded (RA 2). The reason behind Mr. Dean's failure to put these reports before the jury during the sentencing phase of the trial becomes readily apparent upon examination of Mr. Dean's testimony given at the evidentiary hearing. As noted previously, a copy of the complete transcript of evidentiary hearing is being submitted to this Court under separate cover as Exhibit 1. Note the following:

> Q Did you contemplate the possibility of an insanity defense?

A Yes. There had -- I believe Mr. Windsor had already requested the court or previous to my appointment had requested the court for the appointment of a psychiatrist. There, in fact, were - I believe one psychiatrist and one psychologist, Doctor Corwin and Doctor Reichenberg that were appointed to represent Mr. Sullivan and I had the benefit of their reports, which, in my opinion, put an end to a thought of an insanity-type defense, especially in view of the fact that Mr. Sullivan took the position he did not participate in the crime.

Q What about that, was there something in the report that would negate that?

A There was a statement attributed to Mr. Sullivan in Doctor Corwin's report --

(Exhibit 1, Vol.II, p. 309, lines 6-22) In any event, when petitioner testified in his own behalf at trial, his counsel elicited most, if not all, of the pertinent data, sans psychiatric terminology, set forth in the doctors' reports that petitioner now claims should have been introduced in evidence. Note the following quoted from the transcript of state trial proceedings:

Q All right. Now, while you were working at Howard Johnson's in the Miami area, did you have any family problems at the time?

A Yes, I did.

Q What were the nature of those problems?

A Well, there were numerous problems. I would say that the first one was about four or five months after I began working for the Howard Johnson's Company and it is my parents are divorced. And my father had remarried. This had been something that had happened. He had been remarried for eight to 10 years and I was closer to his -- not to my mother, but to his second wife and she was dieing [sic] of cancer. And his nurse called me up and asked me if I could come up to New Hampshire.

* * *

Q All right. Are you originally adopted?

A Yes, I am

Q Are you a homosexual?

A Yes, I am.

Q Now, you indicated that Reid McLaughlin had some discussion with you in October of last year about coming to Miami. Did you accompany him to Miami at that time?

A No, I did not.

Q Did there come a time when you accompanied Reid McLaughlin to Miami?

A Yes, I did.

Q When was that?

A In March of this year, late March.

Q How did that trip happen to come about?

A Well, I had returned to New Hampshire because my father had suffered a paralyzing heart attack in June and he was unable to care for himself and he was alone and I returned to be with him at that time approximately two or three months after it happened. And, once he regained his composure and was able to take care of himself I made calls to friends I knew, to a friend I knew here in Miami and I placed two or more calls to this person and arranged for employment at the University of Miami at the Rathskeller.

(State court trial transcript, pp. 1453, 1455, 1456)

Again, petitioner's position is sought to be maintained on the theory of what his counsel did not do; however, respondents look to what counsel did do and his overall performance in representing petitioner to establish that he did render effective assistance. Respondents' appendix sets forth a thorough review of Mr. Dean's testimony as to what he did do in representing petitioner (RA 1-15); the expert testimony of Judge Gable and Judge Cowart (state trial judges); and all other testimony adduced at the hearing. Further, on the reports of the doctors, Raymond Martin Windsor testified that he too had explored the possibility of several defenses and requested a psychiatric report. He received the reports from Drs. Corwin and Reichenberg and stated that Dr. Corwin's report corroborated petitioner's

admitted responsibility in the matter. (RA 25) No wonder petitioner's counsel did not seek to introduce the reports in evidence at the sentencing hearing! Had he done so, it would have been egregious error particularly in view of petitioner's claim of absolute innocence.

Respondents submit that the focus in the instant case should be on the nature and source of the right to counsel afforded by the Sixth Amendment. We think the proper analysis should be based upon what counsel did and whether petitioner has been denied "a fundamental right essential to a fair trial," in the context of the entire proceeding. See, Gideon v. Wainwright, 372 U.S. 335, 339-344 (1963). As an essential premise to its analysis, the Gideon Court noted that in any due process inquiry the concern is whether in the totality of the circumstances the proceeding was fundamentally unfair. 372 U.S., at 339. In an unbroken line of decisions this Court has focused upon the fundamental denial of due process in the complete absence of counsel or in critical circumstances tantamount to the total denial of counsel.[2] Indeed, just recently this Court has held that the central consideration in an ineffective counsel claim is whether a defendant has been denied fundamental due process and a fundamentally fair trial. See, United States v. Frady, ___ U.S. ___, 102 S.Ct. 1584 (1982); Engle v. Isaac, ___ U.S. ___, 102 S.Ct. 1558 (1982). It is submitted that the focus upon the fundamental nature of the right to counsel rather than laboring

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[2] See, Powell v. Alabama, 297 U.S. 45 (1932)(ability to confer); Avery v. Alabama, 308 U.S. 444 (1940)(ability to confer); Ferguson v. Georgia, 365 U.S. 570 (1961)(no direct examination of defendant); Hamilton v. Alabama, 368 U.S. 52 (1961)(no counsel at guilty plea); White v. Maryland, 373 U.S. 59 (1963)(same); Geders v. United States, 425 U.S. 80 (1970)(consultation with defendant); Brooks v. Tennessee, 406 U.S. 605 (1972)(defendant required to testify as first defense witness); Herring v. New York, 422 U.S. 853 (1975)(denial of closing argument); Faretta v. California, 422 U.S. 806 (1975)(no consent to counsel); Holloway v. Arkansas, 435 U.S. 475 (1978)(conflict of interest); Cuyler v. Sullivan, 446 U.S. 335 (1980)(same).

over a checklist of what should have been done is consistent with the proper application of the great writ and essential to finality. "A criminal trial concentrates society's resources at one 'time and place in order to decide within the limits of human fallibility, the question of guilt or innocence'." Engle v. Isaac, 102 S.Ct., at 1571. "Every trial presents a myriad of possible claims." Id. at 1574. It is inevitable that counsel will through strategy, ignorance, mistake, or many other reasons, choose to omit certain claims while pursuing others. Id. at 1572, n. 4; 1574-1575. The Constitution, therefore, could not reasonably require that counsel recognize and raise every conceivable claim. Id; Wainwright v. Sykes, 433 U.S. 72, at 91 (1977); Estelle v. Williams, 425 U.S. 501, at 512-513 (1976). In United States v. Hasting, ___ U.S. ___, 103 S.Ct. 1974, at 1980 (1983), the Court observed that, "taking into account the reality of the human fallibility of the participants, there can be no such thing as an error-free, perfect trial and that the Constitution does not guarantee such a trial." Due regard for finality supposes that a criminal trial must not be followed by a trial of a defendant's lawyer. See, Wainwright v. Sykes, at 114, n. 13 (Brennan, J., dissenting); See also Bator, Finality in Criminal Law and Federal Habeas Corpus for State Prisoners, 76 HARV.L. REV. 741 (1963). Such a practice, "degrades the prominence of the trial itself." Isaac, 102 S.Ct., at 1571. It is submitted that the underlying purpose of the great writ is, "a bulwark against convictions that violate 'fundamental fairness.'" Isaac, 102 S.Ct., at 1570. Reasonably, any reexamination of counsel's performance must be guided by the polar star of fundamental fairness.[3]

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[3]This analysis is also compatible with the original purpose of the writ at common law to correct only fundamental error. See, Ex Parte Bollman, 8 U.S. (4 Cranch) 75, at 95 (1807)(Marshall, C.J.); J. Story, Commentaries on the Constitution of the United States, 157 (1883); McFeely, The Historical Development of Habeas Corpus, 30 S.W.L.J. 585 (1976).

As stated by the Eleventh Circuit:

> Each case turns on its own facts and the effectiveness of counsel must also be judged on the facts and conduct of those involved in each case. Goodwin v. Balkcom, at 804. We have carefully reviewed counsel's performance during the penalty phase, in light of the totality of the circumstances as they were known to counsel at that time, and find that counsel's performance did not fall below the "reasonably effective assistance" standard.

Sullivan v. Wainwright, 695 F.2d 1306, at 1309 (11th Cir. 1983). Respondents submit that the record demonstrates that petitioner received a fair trial, consequently he received constitutionally adequate representation. The Constitution requires no more.

ISSUE II

WHETHER THE LOWER COURT ERRED IN CONCLUDING THAT IT WAS BARRED FROM CONSIDERING THE MERITS OF PETITIONER'S CLAIMS REGARDING JURY INSTRUCTIONS ON THE BASES OF (1) PROCEDURAL DEFAULT AND (2) FAILURE TO SATISFY THE "CAUSE AND PREJUDICE" REQUIREMENT OF Wainwright v. Sykes, 433 U.S. 72 (1977).

Even though the Eleventh Circuit admitted that all of petitioner's claims relating to jury instructions were barred by Wainwright v. Sykes, 433 U.S. 72 (1977), and Engle v. Isaac, ___ U.S. ___, 71 L.Ed.2d 783, 102 S.Ct. 1558 (1982), and that petitioner "ha[d] not advanced the Sykes issue nor has he advanced any cause for the procedural default nor proffered any prejudice resulting therefrom," the court nevertheless considered whether the requirements of Sykes and Isaac had been met. 695 F.2d, at 1310. Relying on the "novelty of [the] constitutional claim," the court assumed that the cause prong of Sykes had been met and then proceeded to determine the existence vel non of prejudice. Relying on United States v. Frady, 456 U.S. 152, 167-68 (1982), quoting, Henderson v. Kibbe, 431 U.S. 145, 154 (1977), the court concluded that "the lack of showing of actual prejudice under Sykes bars our consideration of the merits of Sullivan's claims regarding the jury instructions." 695 F.2d, at 1311.

However, petitioner now argues that a reasonable juror could have understood the instructions in a constitutionally impermissible way. And, if a reasonable juror "could have understood" the instructions in such an impermissible way, then petitioner wants this Court to assume that the jurors did misunderstand the instructions. Not only is this precise issue barred from consideration by Picard v. Conner, 404 U.S. 270 (1971), the most compelling demonstration of error in the assumption petitioner asks this Court to make is a comparison with the seminal decision in United States v. Agurs, 427 U.S. 97 (1976). The Agurs Court in assessing the effect of new evidence consisting of discovery material upon a claim for new trial, clearly delimited claims of constitutional error thusly:

> The mere possibility that an item of undisclosed information might have helped the defense, or might have affected the outcome of the trial, does not establish "materiality" in the constitutional sense.

427 U.S., at 109-110. Consistent with Agurs, see Chambers v. Maroney, 399 U.S. 42, at 53-54 (1970), and United States v. Valenzuela-Bernal, ___ U.S. ___, 102 S.Ct. 3440 (1982). Respondents submit that the "heavy burden" standard in Agurs and the "outcome" analysis of the foregoing authorities are totally consistent with the policy and underlying philosophy in collateral proceedings noted in Frady and are the central motivation for the rule in United States v. Decoster, (Decoster III), 624 F.2d 196 (D.C.Cir. 1979), and Knight v. State, 394 So.2d 997 (Fla. 1981). See also, United States v. Hasting, ___ U.S. ___ 103 S.Ct. 1974 (1983), and the Fifth Circuit's discussion of the Florida death penalty statute in Spinkellink v. Wainwright, 578 F.2d 582 (5th Cir. 1978), cert.denied, 440 U.S. 976, citing the language in this Court's decision in Proffitt v. Florida, 428 U.S. 242 (1976), rejecting the contention that the Florida statute (§ 921.141) contained limiting language with respect to mitigating circumstances that the judge and jury could

properly consider. Spinkellink, 578 F.2d, at 620, 621. Equally informative is the magistrate's treatment of this issue in her review and recommendation. Please see P.A. 99a-104a.

Petitioner's contention that the trial judge relied on a nonstatutory aggravating circumstance was rejected by the court below. Sullivan, 695 F.2d, at 1312. Indeed, the coup de gras to petitioner's "lack of remorse" argument is the decision of this Court in Barclay v. Florida, ___ U.S. ___, 103 S.Ct. 3418 (1983). Still, what petitioner fails to point out, perhaps intentionally so, is that at the time of his trial in November, 1973, and even at the time the Florida Supreme Court affirmed his conviction and sentence in November 1974, the use of nonstatutory aggravating factors had not been condemned by the Florida Supreme Court. It was not until Purdy v. State, 343 So.2d 4 (Fla. 1977), was decided that the use of aggravating factors was restricted to those enumerated in the statute. Purdy was decided March 25, 1977, more than two years subsequent to the decision of the Florida Supreme Court in Sullivan v. State, 303 So.2d 632 (Fla. 1974), on November 27, 1974.

The decision in Sireci v. State, 399 So.2d 964 (Fla. 1981), is informative. There, the court remarked as follows:

> The defendant further argues that the state presented evidence to the jury of a nonstatutory aggravating factor: the defendant's lack of remorse. The trial judge did not find "lack of remorse" as an aggravating factor. While lack of remorse cannot constitute an aggravating circumstance, it can be offered to the jury and judge as a factor which goes into the equation of whether or not the crime was specially heinous, atrocious, or cruel. In Sullivan v. State, 303 So.2d 632 (Fla. 1974), cert.denied, 428 U.S. 911, 96 S.Ct. 3226, 49 L.Ed.2d 1220 ( ), the fact that the defendant allegedly stated "I don't feel no different," constituted part of the equation which went into the finding of "heinous, atrocious, and cruel." Similarly, in Hargrave v. State, 366 So.2d 1 (Fla. 1978), the statements of the defendant that he had killed before and it would not bother him to

> kill again were considered as applicable to a consideration of whether or not the aggravating factor "heinous, atrocious, and cruel" was present beyond a reasonable doubt. In both of these cases the death sentence was upheld. In the case sub judice the trial court clearly did not consider "lack of remorse" as a separate aggravating factor.

Id. at 971, 972. It is respondents' position that the trial judge never considered "lack of remorse" as an aggravating factor. It was nothing more than an observation of Sullivan's demeanor in the courtroom equally observable by the jury. This conclusion is supported by the fact that Justice Overton in his specially concurring opinion said nothing about lack of remorse being one of the aggravating factors considered by the trial judge. 303 So.2d 637, 638. But assuming arguendo that the trial judge did consider petitioner's lack of remorse, he was entitled to do so under the rationale of Sireci, supra, because it was a factor which went into the equation of whether or not the crime was especially heinous, atrocious, or cruel.

As stated earlier, the issue is precluded by Sykes and Isaac but it is interesting to note that it is also meritless.

ISSUE III

> WHETHER THE "ESPECIALLY HEINOUS, ATROCIOUS, AND CRUEL" AGGRAVATING FACTOR WAS PROPERLY APPLIED TO PETITIONER'S CASE.

Petitioner's argument on this point is totally devoid of merit and was deemed unworthy of comment by the lower court. In Spinkellink v. Wainwright, supra, the Fifth Circuit reasoned:

> If the federal courts retried again and again the aggravating and mitigating circumstances in each of these cases, we may at times reach results different from those reached in the Florida state courts, but our conclusions would be no more, nor no less, accurate. Such is the human condition. Cf. Stone v. Powell, 428 U.S. 465, 493 n. 35, 96 S.Ct. 3037, 3051-3052 n. 35, 49 L.Ed.2d 1067 (1976)(condemning the respondents' "basic mistrust of the state courts as fair and competent forums for the adjudication of federal constitutional rights.").

> The Supreme Court in Proffitt, or in Furman, Gregg, Jurek, Woodson, or Roberts, could not have intended these results. We understand these decisons to hold that capital punishment is not unconstitutional per se, and that a state, if it chooses, can punish murderers and seek to protect its citizenry by imposing the death penalty--so long as it does so through a statute with appropriate standards to guide discretion. If a state has such a properly drawn statute--and there can be no doubt that Florida has--which the state follows in determining which convicted defendants receive the death penalty and which receive life imprisonment, then the arbitrariness and capriciousness condemned in Furman have been conclusively removed.

Id. at 605.

Petitioner simply contends that the crime for which he was convicted was not heinous, atrocious and cruel and attempts to support this thesis by later case law. Respondents point out that this identical situation has been held to be especially heinous, atrocious, or cruel in three cases subsequent to Sullivan v. State, 303 So.2d 632 (Fla. 1974). See Knight v. State, 338 So.2d 201 (Fla. 1976); Douglas v. State, 328 So.2d 18 (Fla. 1976); and Jackson v. State, 366 So.2d 752 (Fla. 1978).

It is true that not all "execution-type slayings" are heinous, atrocious, or cruel within the meaning of Florida's death penalty statute. For example, see Riley v. State, 366 So.2d 19 (Fla. 1979); Cooper v. State, 336 So.2d 1133 (Fla. 1976), and Menendez v. State, 368 So.2d 1278 (Fla. 1979). But there are those cases where the execution-type slaying of a victim does come within the meaning of this aggravating circumstance. Petitioner's case is one of them. The cases relied upon by petitioner are factually distinguishable, in that there was no kidnapping and taking to a secluded area while the victims suffered, knowing, or at least anticipating, that they were to be executed. Indeed, this Court is invited to review the facts of the crime in Spinkellink, 578 F.2d, at 586. Note the following:

The trial jury recommended that Spenkelink receive the death penalty. The trial court agreed. Pursuant to Fla.Stat.Ann. § 921.141(3), it found that the felony "was committed for pecuniary gain, either for another person's money or to re-coup his own," that the crime "was especially heinous, atrocious and cruel," that Spenkelink "was previously convicted of a felony involving the use, or threat of violence to another, to-wit: armed robbery," and that Spenkelink committed the crime while "under sentence of imprisonment." The only mitigating circumstance found by the trial court was "that possibly the defendant was under the influence of extreme mental or emotional disturbance," a consideration which, "based on the record as a whole," the court did not regard "as a substantial factor." See Fla.Stat.Ann. §§ 921.141(5), (6). The Supreme Court of Florida affirmed both the conviction and sentence. Spinkellink v. State, 313 So.2d 666 (Fla.1975), cert.denied, 428 U.S. 911, 96 S.Ct. 3227, 49 L.Ed.2d 1221 (1976). With respect to the sentence of death, the Florida Supreme Court stated:

> As more fully set out above the record shows this crime to be premeditated, especially cruel, atrocious, and heinous and in connection with robbery of the victim to secure return of money claimed by Appellant. The aggravating circumstances justify imposition of the death sentence. Both Appellant and his victim were career criminals and Appellant showed no mitigating factors to require a more lenient sentence.

313 So.2d at 671. The United States Supreme Court denied certiorari. Spenkelink v. Florida, 428 U.S. 911, 96 S.Ct. 3227, 49 L.Ed.2d 1221 (1976).

* * *

Finally, in responding to the argument that Section 921.141's eighth aggravating circumstance was unconstitutionally vague and overbroad, the Court in Proffitt even mentioned the case of petitioner Spenkelink:

> The Supreme Court of Florida has affirmed death sentences in several cases, including the instant case, where this eighth statutory aggravating factor was found, without specifically stating that the homicide was "pitiless" or "torturous to the victim." See, e. g., Hallaman v. State, 305 So.2d 180 (1974)(victim's throat slit with broken bottle); Spinkellink v. State, 313 So.2d 666 (1975)("Career criminal" shot

> sleeping traveling companion); Gardner v. State, 313 So.2d 675 (1975)(brutal beating and murder); Alvord v. State, 322 So.2d 533 (1975)(three women killed by strangulation, one raped); Douglas v. State, 328 So.2d 18 (1976) (depraved murder); Henry v. State, 328 So.2d 430 (1976)(torture murder); Dobbert v. State, 328 So.2d 433 (1976)(torture and killing of two children). But the circumstances of all of these cases could accurately be characterized as "pitiless" and "unnecessarily torturous," and it thus does not appear that Florida Court has abandoned the definition that it announced in Dixon and applied in Alford, Tedder, and Halliwell.
>
> 428 U.S. at 255 n. 12, 96 S.Ct. at 2968 n. 12 (opinion of Stewart, Powell, and Stevens, JJ.)(emphasis added).

Id. at 588, 589, 602. See also the discussion in Moore v. Balkcom, 709 F.2d 1353, 1358-1360 (11th Cir. 1983). It is submitted that the construction placed upon the aggravating circumstance "especially heinous, atrocious, or cruel" by the Florida Supreme Court in Sullivan, Knight, Douglas, and Jackson constitute an authoritative construction of a state statute which should be binding on this Court. Wainwright v. Stone, 414 U.S. 21 (1973); Miller v. California, 413 U.S. 15 (1973); Scripto, Inc. v. Carson, 362 U.S. 207, 210 (1960).

The foregoing can be of academic interest only because the alleged "unconstitutional application of the 'especially heinous, atrocious and cruel factor'" (Petition, p. 31) was never raised in the trial court and not challenged on petitioner's direct appeal. The procedural default is clear and Sykes and Isaac preclude consideration here. Interestingly, petitioner tacitly admits (Petition, p. 27) that this issue was only raised in state post-conviction proceedings and in federal habeas. See Palmes v. State, 425 So.2d 4, 6 (Fla. 1983).

ISSUE IV

WHETHER THE LOWER COURT ERRED IN DETERMINING THAT THE REFERENCE TO A POLYGRAPH TEST BY A STATE WITNESS WHICH WAS DEEMED HARMLESS ERROR UNDER STATE LAW DOES NOT PRESENT AN ISSUE OF CONSTITUTIONAL OR FEDERAL LAW COGNIZABLE IN A FEDERAL HABEAS CORPUS PROCEEDING.

After reviewing what three lower courts held on this issue, petitioner says that "[e]ach court erred." (Petition, p. 34) More interesting is petitioner's allegation that the lower court "could not even find the federal issue." (Petition, p. 34) There is a reason for this; there was none to be found!

The Florida Supreme Court in view of the overwhelming evidence of guilt held that as a matter of state law the polygraph reference was harmless, citing to Coral Gables v. Levison, 220 So.2d 430 (Fla.3d DCA 1969), and Gagnon v. State, 212 So.2d 337 (Fla.3d DCA 1968). Sullivan, 303 So.2d 635, n. 2. The court reasoned as follows:

> We cannot know how the jury construed his answer, or what weight was given to it; therefore, to assert that it was construed as meaning he had already passed it would be pure speculation on our part. Reversible error cannot be predicated on conjecture. Singer v. State, 109 So.2d 7 (Fla. 1959).
>
> * * *
>
> Without passing on the issue of whether the question on cross-examination concerning the relationship between the outcome of McLaughlin's testimony and his eventual sentence opened the door to a reference to the polygraph test condition of his plea bargain (the State contending that this was proper rehabilitation of the witness, in the nature of a showing that the State had good reason to attach credibility to his testimony), we observe that the evidence of appellant's guilt, including both the testimony of McLaughlin (a participant in the homicide) and appellant's prior confession is so overwhelming that we cannot say that this one utterance caused a miscarriage of justice which would necessitate a reversal of the conviction. We conclude that, under the peculiar circumstances presented here, the trial court did not commit reversible error in denying appellant's motion for mistrial.

Id. at 636. (Emphasis ours.) Justice Overton (concurring specially) cited Harrington v. California, 395 U.S. 250 (1969), Milton v. Wainwright, 407 U.S. 371 (1972), and Schneble v. Florida, 405 U.S. 427 (1972), for the proposition that where independent evidence of guilt is overwhelming, a constitutional error can be rendered harmless. Respondents point out that two of the three state decisions cited by the Florida Supreme Court as authority for its holding predates the decisions of this Court in Harrington, Milton, and Schneble. In fact no citation to federal authority is to be found in the opinions handed down in the state court decisions relied upon by the Florida Supreme Court for its holding of harmless error.

Just recently in Michigan v. Long, ___ U.S. ___, 33 Cr.L. Rptr. 3317, this Court had occasion to discuss its jurisdiction where the decision for which review is sought rests on an adequate and independent state ground. The Court remarked in pertinent part as follows:

> If a state court chooses merely to rely on federal precedents as it would on the precedents of all other jurisdictions, then it need only make clear by a plain statement in its judgment or opinion that the federal cases are being used only for the purpose of guidance, and do not themselves compel the result that the court has reached. In this way, both justice and judicial administration will be greatly improved. If the state court decision indicates clearly and expressly that it is alternatively based on bona fide separate, adequate, and independent grounds, we, of course, will not undertake to review the decision.

The focus of Justice Stevens' dissent was on the Court's decision to presume that adequate state grounds are intended to be dependent on federal law unless the record plainly shows otherwise. The dissent points out that if the intermediate approaches are rejected, the Court is then left with a choice between two presumptions: one in favor of taking jurisdiction, and one against it. Precedent shows that the latter presumption has always prevailed. In support of this thesis, Justice Stevens quotes from Lynch v. New York, 293 U.S. 52 (1934):

"Where the judgment of the state court rests on two grounds, one involving a federal question and the other not, or if it does not appear upon which of two grounds the judgment was based, and the ground independent of a federal question is sufficient in itself to sustain it, this Court will not take jurisdiction. Allen v. Arquimbau, 198 U.S. 149, 154, 155; Johnson v. Risk, [137 U.S. 300, 306, 307]; Wood Mowing & Reaping Machine Co. v. Skinner, [139 U.S. 293, 295, 297]; Consolidated Turnpike Co. v. Norfolk & Ocean View Ry. Co., 228 U.S. 596, 599; Cuyahoga River Power Co. v. Northern Realty Co., 244 U.S. 300, 302, 304." 293 U.S., at 54-55.

Id. at 3327.

In an attempt to get a foot inside the door, petitioner in his argument under this point presents an issue that was never precisely presented to any of the lower courts. In all of the courts below the issue was simply whether the polygraph reference constituted harmless error. Now, for the first time, it is contended that the state prosecutor's "deliberate manipulation of the evidence" violates due process standards. (Petition, p. 36.) This is in direct violation of Picard v. Conner, supra, and barred from consideration by this Court by Sykes and Isaac.

In concluding under this point, it deserves mention that this Court has already rejected petitioner's argument on the polygraph issue. See the Petition filed in this Court in Sullivan v. Florida, 428 U.S. 911 (1976).

CONCLUSION

The petition for writ of certiorari should be denied.

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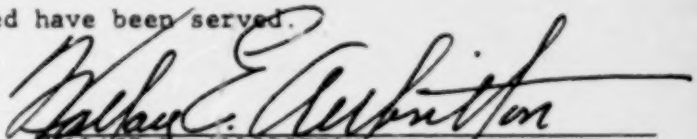
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 23rd day of September, 1983, a copy of this Brief for Respondent in Opposition was mailed, postage prepaid, to Mr. Roy E. Black, 1300 Miami Center, 100 Chopin Plaza, Miami, Florida 33131. I further certify that all parties required to be served have been served.



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Assistant Attorney General

of Counsel

5-5-80

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF FLORIDA

ROBERT A. SULLIVAN,

Petitioner,

-v-

CASE NO. 79-2721-Civ-JAG

LOUIE L. WAINWRIGHT, Secretary, Department of Corrections; and DAVID H. BRIERTON, Superintendent of Florida State Prison at Starke, Florida,

Respondents.

RESPONDENTS' MEMORANDUM BRIEF

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Respondents' Appendix

IN THE UNITED STATES DISTRICT COURT
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RESPONDENTS' MEMORANDUM BRIEF

PRELIMINARY STATEMENT

The record is in four volumes. However, Volumes II, III, and IV are bound in two volumes each, making a total of seven separately bound volumes. The record volumes are consecutively paginated and references thereto will be made by the symbol "R" followed by appropriate page number.

STATEMENT OF THE CASE AND FACTS

This cause was initiated by the filing of a petition for writ of habeas corpus in this court on June 21, 1979. Following the filing of subsequent pleadings and the issuance of an order dated February 12, 1980, this cause came on for hearing on March 6, 1980 before the Honorable Patricia Jean Kyle, United States Magistrate.

Dennis Allen Dean, Sr., was called as a witness for petitioner (R 248). Mr. Dean testified that he was appointed to represent petitioner on October 4, 1973. Mr. Dean on direct examination basically outlined the things he did do in his representation of petitioner (R 248-282). On cross-examination, Mr. Dean testified as to his legal education

and experience (R 298-302). The first time that Dean saw petitioner was at a suppression hearing and he (Dean) formed the opinion then that petitioner would be a difficult witness to present to a jury (R 303). After being appointed to represent petitioner, the first thing Dean did was to have a lengthy meeting with petitioner and secure the files and depositions from Ray Windsor and Carling Stedman (R 304, 305). It was Dean's opinion that the state had an extremely strong case against petitioner (R 306). Part of Dean's trial strategy was to develop error and make the most of it on a subsequent appeal (R 307). Dean testified that it was difficult to get petitioner to think in a cohesive manner as he wanted certain things brought up that Dean felt had no relevance to the defense theory of the case (R 308). Dean had occasion to contemplate the use of possible affirmative defenses such as insanity. However, after reviewing the reports of Drs. Corwin and Reichenberg, the theory of an insanity-type defense was discarded (R 309). Counsel for petitioner agreed that there was no basis for an insanity defense (R 311). The defense of intoxication was considered but was discarded because it was believed that same was insufficient for the purpose of attacking the voluntariness of petitioner's confession (R 312, 313). The defense of self-defense was considered but this would have been inconsistent with petitioner's claim that he had nothing to do with the crime and was not even at the scene (R 313, 314). An effort was made to develop an alibi defense through the use of a court-appointed investigator. But this met with no success because the alibi defense could not be pinpointed with specificity and there was no corroboration by independent witnesses (R 314). Other matters were considered such as coercion but not discussed with petitioner (R 315).

After formulating the decision to proceed with the basic defense of trying to create some form of reversible error, Dean had the benefit of twenty four depositions that had already been taken in the case and he rescheduled many of the depositions (R 316). In other words, Dean stated that it was his belief that certain witnesses were crucial to the state's case and he wanted to redepose them to get more statements on record for a possible later contradiction (R 317). Dean also had the benefit of the transcript of the motion to suppress which was a three or four hour hearing (R 317). All of the depositions were introduced in evidence as a composite exhibit, Defendant's (respondents') Exhibit 13 (R 318). At all of the depositions taken by Dean, with the exception of one, petitioner was present (R 319). Dean wanted petitioner present to hear what those witnesses were to testify and also to have him available to feed him any questions that petitioner thought should be asked. Dean then narrated other factors that he did in preparation for trial (R 320, 321). Petitioner was given an opportunity to review his prior testimony at the motion to suppress and other depositions were made available to him so that he could prepare himself for trial (R 322). Because of extensive pretrial publicity, Dean filed a motion for change of venue but Judge Cowart deferred ruling on it for the purpose of seeing if a jury could be chosen (R 323). Dean made an opening statement and prepared for closing argument. Of course, this preparation for closing argument was modified as the trial progressed (R 324). Dean explained the jury selection process to petitioner (R 325) and during the process of selecting the jury petitioner never indicated any dissatisfaction with the manner in which Dean was conducting same (R 326).

At no time during the trial did petitioner ever indicate that he was dissatisfied with the way Dean was conducting himself in the presentation of petitioner's defense (R 327). Petitioner expressed no dissatisfaction with Dean's representation during the sentencing phase of the trial (R 328). Dean filed a motion for new trial and then subsequently handled the appeal to the Florida Supreme Court. At no time during the pendency of the appeal did petitioner express any dissatisfaction with Dean's representation of him at the trial level (R 329). The next thing that Dean did for petitioner was to secure an order from the United States Supreme Court staying execution of sentence (R 329). Dean filed a petition for writ of certiorari in the United States Supreme Court which was subsequently denied in July of 1976. Incidentally, petitioner was in court when Judge Cowart appointed Dean as a special public defender for purposes of appeal. At this time, petitioner made no objection whatsoever to Dean's continuing representation of him for purposes of appeal (R 331). Dean stated that over a period of time he had received numerous letters from petitioner indicating his satisfaction with his (Dean's) representation.

In January of 1977, Dean appeared on behalf of petitioner at the Parole Commission hearing. This was at petitioner's request (R 337). At the time Dean appeared before the Parole Commission in petitioner's behalf he had already received information from various sources that petitioner had, in fact, committed the crime (R 338). In the latter part of March 1977, Dean appeared before the cabinet to plead for mercy at the Clemency Board hearing (R 339). This also was done at petitioner's request (R 340). After having done everything that he could in petitioner's behalf, Dean began communicating the idea to petitioner that it would be a good idea if he got a new attorney (R 340). It was during this period of time that Dean discussed with

petitioner the possibility of post-conviction relief motions. As a possibility of getting back into court and getting the appellate process started all over again, Dean indicated the possibility of making the claim of ineffective assistance of counsel at the motion to suppress hearing. During all of this time, petitioner never indicated any dissatisfaction with Dean's representation (R 341). Neither did petitioner directly or through any third party indicate any dissatisfaction with Dean's representation either at the trial or appellate level (R 341). The first time Dean received any indication that petitioner was dissatisfied with his representation was when the 3.850 motion was filed in Circuit Court before Judge Gable.

Mr. Dean stated that he had had occasion to review the allegations alleged by petitioner against him in the 3.850 motion and in the habeas before this court. Dean then explained as best he recalled why the trial date was changed from November 26, 1973 to the first week of November 1973. Dean stated that he moved for a continuance which was denied. In explaining why this was done, Dean frankly stated that he never wanted to try the case if he could avoid it. In fact, any delay that could have been secured could have been only beneficial for the defense (R 349). Dean stated that the motion could possibly be characterized as frivolous and that it was filed with the hope of delaying the trial. Petitioner was aware that Dean was going to make the motion for continuance and the reasons therefor (R 350). Dean stated that he was prepared for trial; that he had done everything that he could do (R 350, 351). Dean further stated his reasons for believing that it was useless to try to make Frank Barden a suspect (R 352, lines 7-17). Certain matters were stipulated for

the purpose of avoiding the use of 8 x 10 color photographs of the victim. Consequently, Dean stated that if there was no contest as to the cause of death then it would be best to avoid the state having to use gruesome, prejudicial photographs (R 353). Dean stipulated as to the manner, cause, date, and time of death in order to avoid prejudicial testimony coming out before the jury (R 354). All of this was discussed with petitioner who was present at the pretrial conference. Again, the stipulations entered into by Dean were made with the approval of petitioner (R 356). Further, Dean explained the strategy of avoiding Dr. Beamer's testimony and petitioner indicated no disagreement with Dean's tactics (R 357).

Dean also wanted to avoid the victim's wife from testifying as he believed this would have been prejudicial and petitioner agreed (R 357, 358).

As to why no plaster casts were taken of any footprints, Dean testified that there were no identifiable prints that could have been attributed to anybody (R 360). Dean further testified that he requested no laboratory analysis of the tire iron because same had been wiped off or wiped clean. After all, Dean stated that the tire iron was found in petitioner's car and he assumed that petitioner's fingerprints would have been on it. Petitioner never denied the ownership or existence of the tire iron.

Dean next explained concerning the alleged failure to investigate the potential of any latent prints on the adhesive tape with which the victim was bound (R 362). According to Ron Shuk, those prints appeared to be palm prints and were on the sticky side of the tape and could not, in Shuk's opinion, be identified to petitioner or

anyone else. Shuk, according to Dean, testified that it was his opinion based on the position of the tape that the prints found thereon were the victim's prints (R 363). Dean had no information in his possession that he could have given to anybody for the purpose of having Shuk make a print comparison (R 364).

Next Dean explained that he knew of a Gilbert Jackson. This person was in the car at the time petitioner was arrested on April 17, 1973. Petitioner never indicated that he felt that Mr. Jackson would have anything to say that would be relevant to the case. In fact, Jackson had only been in Miami a few days and was not there when the murder allegedly took place (R 365, 366). Dean stated that he did not file a motion for rehearing on the suppression issue because he was satisfied from an appellate standpoint with the trial judge's denial of the motion (R 366). Dean reviewed the testimony of the suppression hearing and was satisfied that Mr. Windsor and Mr. Bronis had made a proper record for appellate purposes and there was no need to supplement that record in any fashion whatsoever (R 367). Dean explained the efforts made to locate a Thomas Murphy. This was an individual that petitioner had met at Keith's Bar whom petitioner said was a lawyer from Boston. On the night of the arrest, petitioner claimed that he had asked the police to go back to the bar and contact Mr. Murphy so he could have the benefit of counsel. Petitioner said the police refused so to do. The police denied knowledge of this type of conversation. Dean checked through Martindale-Hubbell and was unable to locate a Thomas Murphy as an attorney in Boston or anywhere in Massachusetts. Petitioner had absolutely no information other than this man was supposed to be an attorney from Boston. Dean was unable to locate Mr. Murphy and until this date no one has been successful in

finding this gentleman (R 368).

Dean next explained that he could see no relevance to any testimony of a state highway patrolman who allegedly passed by the vehicle in which the victim was held prior to the murder. Dean pointed out that there was testimony in petitioner's confession that while he and Reid McLaughlin were driving the victim around on the Tamiami Trail, at one point they stopped the car. The victim was taken into the woods or an area off the road and while they were there petitioner saw a Florida Highway Patrol car drive by. Dean pointed out that for him to try to corroborate what petitioner had said in his confession didn't make a whole lot of sense (R 369, 370).

Dean again explained why he was unable to impeach Frank Barden because he had not been adjudicated guilty. In spite of this, Dean stated he still attempted to perfect the record for purposes of appeal. In fact, Dean kept plodding in this area until Judge Cowart got upset with him and told him he had better quit (R 370, 371).

Dean stated that he did not present any legal argument in support of judgment of acquittal made at the conclusion of the state's case because it wasn't necessary to do so in order to preserve the record. Dean stated that at that point in time trying to convince the judge that a prima facie case had not been established would have been ludicrous. Dean pointed out that the state on appeal was unable to say that any of the issues presented had not been appropriately preserved for appellate review (R 372).

In answer to the accusation that he did not submit any written jury instructions, Dean pointed out that proposed jury instructions were prepared and submitted to him. He reviewed them and was satisfied with them (R 372). There

were proposed instructions that Dean objected to which were not given but Dean stated that he was satisfied with the overall instructions (R 373).

In answer to the accusation that Dean inappropriately emphasized that petitioner was a homosexual, Dean stated that he did bring this to the jury's attention as early as voir dire. This was done not only with petitioner's approval but pursuant to his instruction (R 374). In fact, Dean stated that two jurors were excused for cause because this area was explored. Again, Dean stated it was petitioner's idea initially to bring out the fact that he was a homosexual. One reason for this was that petitioner might gain some sympathy from the jury because of that fact (R 375). Defendant's Exhibit 1 for Identification was a list of handwritten questions prepared by petitioner and the very first question thereon related to petitioner's being a homosexual (R 376). This list of questions was introduced in evidence as Respondent's Exhibit 1 (R 377).

Mr. Dean next described the events leading up to a polygraph examination being administered to petitioner by Warren Holmes (R 377-380). Dean stated that petitioner never at any time after the administration of the polygraph examination claimed that Mr. Holmes was lying and that he had not made any of the admissions alleged in the polygraph report (R 380, lines 9-13). Dean recited Holmes' reputation as a polygraph examiner (R 381) and further stated that petitioner never indicated that there was anything wrong with what transpired during the pretest interview (R 382). Dean again repeated that from the time he was appointed until the date of the trial, he had adequate time to prepare the case for trial (R 383, 384).

On redirect examination, counsel for petitioner quoted out of context a portion of a letter dated February 5, 1974 from Dean to petitioner and asked if Dean didn't think that such statement would have a chilling effect on petitioner expressing dissatisfaction with him over any part of the case. Dean answered in the negative (R 389, 390). Further, Dean denied that whether or not there was blood on the tire iron would be of any significance in refuting the testimony of Reid McLaughlin (R 392). Dean pointed out that he didn't know that the tire iron found in the car was attributed to being the tire iron that petitioner supposedly used (R 392). Dean pointed out that several things were admitted in evidence by Judge Cowart for whatever relevancy the jury wanted to give it but that he did not recall McLaughlin saying that it was the same tire iron. Dean explained that he was satisfied in utilizing the evidence, the adhesive tape used to bind the victim, once Mr. Shuk had said he compared the palm print thereon to that of petitioner and it wasn't petitioner's prints nor McLaughlin's prints. Dean explained that he used this in closing argument that since the print on the adhesive tape was not identifiable to either McLaughlin or petitioner, this was consistent with the defense theory that there was a third person involved in the case (R 395). On recross examination, Dean explained the remarks in his letter that petitioner's counsel had inquired about on redirect examination. Please see Dean's testimony at R 398, line 16--R 399, line 6.

On direct examination, it was brought out that in the sentencing phase of the trial Judge Cowart had made the observation that he had observed not one scintilla of remorse displayed by petitioner. Dean was asked if he made any objection to Judge Cowart making a finding that

that was an aggravating circumstance. Dean answered in the negative. Dean then explained that he did not interpret the language of Judge Cowart as finding that the "lack of remorse" was an aggravating circumstance but rather merely an observation (R 260, 261).

Further, on direct examination, Dean was asked questions relating to his cross-examination of Frank Barden, a former manager of the Howard Johnson's Restaurant from which the victim was abducted (R 262, 263). Dean stated that he could not impeach Barden on the basis of a prior conviction of crime because Barden had pled guilty to the crime and adjudication was withheld and he was placed on probation. Consequently, Dean explained, he could not ask Barden if he had ever been convicted of a crime because he, in fact, had not. Dean stated that this notwithstanding he did try to go into the embezzlement and the fact that Barden had fled to Las Vegas and had been picked up there. At this point, Judge Cowart precluded him from going any further into it (R 263). Dean testified that he was satisfied based on his own interpretation of the law that he could not ask Barden the question of whether he had ever been convicted of a crime. There was no trial strategy involved in this; it was a matter of Dean's interpretation of the law (R 264, 265). Dean stated that he had no recollection of filing a motion attacking the composition of the grand jury (R 265). Dean stated that he was satisfied that he had ample time to prepare for the penalty phase of the trial. Subpoenas for six or seven witnesses had been issued and he ended up presenting the testimony of five witnesses (R 268). Dean testified that on the morning of the sentencing phase of the trial, he received Mr. Holmes' polygraph report which disturbed him (R 268, 269). Dean emphasized that although the report may have affected

him personally it did not affect his argument to the jury (R 269, 270).

Dean stated that he was familiar with the case of Witherspoon v. Illinois and was familiar with it in 1973. Counsel for petitioner asked Dean why he did not object to prospective juror Hammiel being excused by the court. Dean explained that his failure to object could have been for one of two reasons: one, he was satisfied from the answers given that the juror met the Witherspoon criteria, and the other was that he didn't want the prospective juror to serve (R 272, 273). Dean was then asked if there was any trial strategy involved in not objecting to prospective juror Hammiels being excused (R 273). Dean explained: "At this time, looking solely at the cold record, I can't tell you why I didn't object to the Court excusing this juror. I can tell you that I didn't want her for whatever reasons. If I wanted her, I would have objected and pursued the matter." (R 274, lines 1-5)

When asked if petitioner ever sent him any names of alibi witnesses, Dean answered that he didn't know if you could characterize them as alibi witnesses. This would be particularly true of the witness Thomas Murphy. Dean stated that Mike the bartender had been contacted by the investigator and confirmed the fact that petitioner was in the lounge almost every night but could not pin it down to any specific time periods such as would be required under the alibi statute (R 274, 275). Dean explained that petitioner was adamant about wanting to take a polygraph test (R 276). A motion was presented to Judge Cowart for this purpose which was granted. Petitioner was transported to the office of Warren Holmes for the purpose of the polygraph. Dean further stated

there was never any discussion with Holmes about the polygraph and that he had no contact at all with Holmes as far as he could recall (R 277).

When asked if he ever entertained the opinion that Mr. Windsor had given petitioner ineffective assistance of counsel at the motion to suppress hearing, Dean explained as follows:

> A No, sir. Now, let me explain, because I know what the follow-up question is.
>
> Near the end of the time when I had made the decision to withdraw from further representation of Mr. Sullivan for various reasons, he had written me and asked if there was any - what possible arguments or avenues were open to him at that point in time. This was in, I believe, 1977 or possibly 1978. This was after I had handled the appeal to the Florida Supreme Court, after I had handled a motion for post-conviction relief before Judge Cowart; after I appeared before the Probation and Parole Commission at Raiford; after I appeared before the Governor and Cabinet in Tallahassee and after I had filed a lawsuit in Tallahassee against the Governor and the Cabinet. All of those things had been explored without success.
>
> I told Bob that I would review the transcript and see if there was any suggestions I could give to him or to whoever his new counsel may be.
>
> In reviewing the transcript, I went over the whole transcript again and as I did, I noticed that at the motion to suppress it appeared that Ray Windsor, who was representing him at the time, took the burden or accepted the burden at the motion. There was some Florida case law at the time that indicated the State has the burden on a motion to suppress hearing.
>
> As giving Mr. Sullivan the possibility of something to argue that had not been previously argued, I suggested that the possibility might lie with an ineffective assistance of counsel motion alleging that Mr. Windsor improperly accepted the burden at the motion to suppress hearing.
>
> (R 279, 280)

At the beginning of Dean's cross-examination by Mr. Adorno it was brought out that petitioner had instructed Dean to retain certain letters and the polygraph examination and not to turn those items over to new counsel that he (petitioner) might obtain (R 282). The reason for this, so

Dean testified, was that petitioner did not want to compromise his position with any new counsel that might be appointed to represent him. Dean was then asked if petitioner had ever explained to him what he meant by compromising himself with his new attorney. At this time, there was an objection based on the attorney-client privilege (R 283) which was overruled by Judge Kyle (R 286, 287). Dean then answered that petitioner had indicated that he wanted to avoid the possibility of a conflict situation as had existed between himself and Mr. Windsor which resulted in Mr. Windsor's withdrawal from the case (R 288). When asked if petitioner ever explained what this conflict was, Dean stated as follows:

> A He indicated in the correspondence that at one point he apologized for not having been completely open with me and - I can't remember the terminology, something like having played games or fibbed - fibbed was his word, but he was sure that I understood why he had done it and it was to avoid the situation that he had with Mr. Windsor.
>
> Q That is, that he told Mr. Windsor he had committed the crime?
>
> A And, then, wanted to testify denying it.
>
> Q Mr. Windsor indicated to him that he would not put him on the stand and suborn perjury?
>
> A That's my understanding, yes.
>
> (R 289)

Dean identified Defendant's Exhibit 5 for Identification (R 291) and stated that it was a letter received by him from petitioner dated March 14, 1974. It was a piece of correspondence in which petitioner referred to his prior conflict or compromising situation with Mr. Windsor. Dean was then asked if he interpreted a certain portion of this letter as an admission by petitioner to Mr. Windsor that he committed the crime (R 292). Dean answered in the affirmative (R 293). Dean was then asked how he interpreted that portion of the letter, Defendant's Exhibit 5 for Identification, which was underlined. Dean answered that it was

his interpretation of that portion of the letter that petitioner had committed the crime but had intentionally not told him of this fact (R 295). Dean was then asked if there was anything in the report submitted by Warren Holmes that led him to develop the interpretation he had just voiced with respect to Defendant's Exhibit 5 for Identification. Dean answered that the statements made in the polygraph report tied into what petitioner stated in his letter of March 14, 1974 (R 297). Dean then identified Defendant's Exhibit 10 and 8 for Identification as letters received by him from petitioner and stated that both of those letters had reference to petitioner asking him to retain certain letters and the polygraph examination and not turn them over to any new counsel (R 298).

Judge Ellen Morphionios Gable was called as a witness by the respondents (R 56). Judge Gable stated her judicial background and then in answer to questions propounded by counsel for respondents testified as to her reasons for not having petitioner present at the state court hearing on petitioner's 3.850 motion. She testified that in view of the extensive affidavit filed by petitioner and the security risk involved that she ruled petitioner would not have to be present at the hearing. She testified that she read the affidavit in its entirety and took it into consideration in making the ruling (R 58, 59). Judge Gable further testified that she had ruled on the effective assistance of counsel issue and held that petitioner had been supplied "completely adequate assistance of counsel." (R 60) Judge Gable testified that she was familiar with Mr. Dean's reputation as an attorney and that she would have appointed him as a special public defender on any given case because "he's an excellent lawyer." (R 60) Further, she stated that

his reputation was excellent (R 61). On redirect examination, the following occurred:

> Q Since you took the affidavit at its face value, not subject to cross examination by the State, would you have also taken into consideration any letters written by the Defendant that Mr. Black, if he saw fit to introduce for you to take into consideration?
>
> A Sure. I thought I made it clear that I would consider anything and all that Mr. Sullivan wanted to present to me in writing, but I wasn't going to have him brought back.
>
> (R 70)

Judge Edward D. Cowart (R 71) was called as a witness by the respondents and after stating his educational, professional, and judicial background testified that it was his opinion that Ray Windsor was a very well qualified, very competent young lawyer, very studious young lawyer (R 76). Judge Cowart stated that there was nothing in his recollection that would lead him to believe that petitioner received ineffective assistance of counsel from Mr. Windsor during the motion to suppress. To the contrary, he stated that the matter was a "well legally argued motion." (R 78) Judge Cowart further testified that prior to his appointment of Mr. Dean as petitioner's counsel he had formed an opinion of his competency as a criminal defense attorney and that in his opinion Dean was a very promising and very thorough young attorney (R 81). Judge Cowart testified that Dean's reputation as a criminal defense attorney was excellent. As to Dean's handling of the pretrial hearings and trial itself, Judge Cowart testified that in his opinion Dean did an excellent job with the material he had to work with (R 82). Judge Cowart characterized the strength of the state's case against petitioner as being exceptionally strong (R 83). When Judge Cowart was asked if petitioner ever at any time voiced to him any dissatisfaction with the representation of Mr. Dean, he answered as follows:

A No, on the contrary, I thought that the concept of the Defendant at that time, or the presentation of the Defendant and his general attitude and demeanor toward Mr. Dean was very cordial and certainly there was no representation or allegation of incompetency that I ever joined issue on.

(R 84)

Robert A. Sullivan, petitioner, testified in his own behalf and his direct examination begins at R 17-48; 100-125. On cross-examination (R 126), petitioner testified that he didn't want to be executed (R 131) and would try his hardest not to be executed. However, he stated he would not lie under oath (R 132). When asked if he had ever lied to his attorneys, he responded as follows: "A Positions have been changed due to circumstances that ... might have been different positions at one point of time which, in answer to your question, yes." (R 133) When asked if he had lied to his attorneys on more than one occasion, petitioner replied: "A In regard -- The only area that I recall was a strategy on my part being as a last resort with Mr. Dean regarding clemency well after my trial." (R 134) Petitioner as far as he could recall stated that he had never lied to Mr. Windsor (R 134). Petitioner testified that he first became dissatisfied with Mr. Dean's representation during the course of the trial and he felt that Dean had sold him out (R 143). The first thing that petitioner didn't like about Mr. Dean was the fact that he moved up the trial date (R 145). During the course of the trial petitioner became disappointed with Mr. Dean's representation (R 147). In fact, he was totally disappointed with Mr. Dean's representation of him at the trial. Petitioner was then asked to produce any letters or motions that he filed with Judge Cowart regarding Dean's representation during the year 1974. In answer, petitioner stated that he filed no motions attacking the competency of Mr. Dean either before Judge Cowart or before any other

judicial body (R 149). Petitioner stated that in the year 1974 he did not write any letters to the Bar complaining of Mr. Dean's representation and neither did he write to anybody requesting a substitution of counsel. In 1975, petitioner stated that he complained to David Kendall of NAACP Legal Defense Fund concerning Dean's representation. However, petitioner did not ask Mr. Kendall to appear before the Supreme Court of the State of Florida and ask for a substitution of counsel (R 150, 151). Petitioner stated that he decided to stick with the attorney who he felt had sold him down the river and allow him (Mr. Dean) to argue his appeal in front of the Florida Supreme Court (R 151). Petitioner testified that Kendall had advised him to put aside the issue of ineffective assistance of counsel until the habeas corpus stage of the case had been reached (R 151, 152). Petitioner admitted that in October of 1973 he knew how to raise the issue of ineffective assistance of counsel before Judge Cowart and that he did not forget this while he was sitting on death row (R 153, line 19--R 154, line 2). Petitioner admitted that Kendall advised him that what Mr. Dean was doing was effective (R 155). In the year 1975, no other letters or motions were filed with any court asking for another attorney (R 155). Petitioner testified that following the denial of certiorari in the United States Supreme Court the thought crossed his mind that it was time to change attorneys. However, he stated that in the year 1976 he did not file any motions for substitution of counsel or write any letters to a court asking for another attorney (R 159). Petitioner stated that he never at any time asked Kendall to take over his case because Dean was incompetent and had sold him down the river (R 161, 162). Petitioner stated that because in his opinion Dean did a lousy job defending him that in that context he did not like Mr. Dean. However, he then admitted that he kept this "lousy man" who did a "lousy job" at the trial level

all the way through 1976, all the way to the United States Supreme Court (R 163). Although there were other lawyers working on the civil litigation, petitioner stated that he never advised any of them that he thought Mr. Dean was incompetent and that he didn't want Mr. Dean on the case. During the pendency of the litigation, Sullivan v. Askew, petitioner stated he never told Tobias Simon or anyone else working on that particular aspect of the case that Mr. Dean had given him ineffective assistance at the trial level and that he wanted to raise the issue as a ground for reversal (R 168, lines 6-18). Petitioner further testified that when Dean volunteered to represent him before the Clemency Board that he agreed to this representation. Petitioner admitted that even though he felt Dean had sold him down the river that because of Mr. Kendall's belief that Dean would be best suited to represent him, he agreed to the representation. Petitioner was unhappy with Dean's representation of him at the trial level in every phase thereof, and yet he agreed to allow Mr. Dean to stand up before the Parole Commission and again be his mouthpiece (R 172, 173). Petitioner admitted that at the hearing before the Parole Commission he never at any time complained of Dean's alleged ineffective representation (R 173, 174). Petitioner did state that basically he was satisfied with Dean's representation of him before the Parole Commission (R 175). Petitioner admitted that he did not file any documents between the date of the hearing in front of the Parole Commission, January 17, 1977, and the date he appeared in front of the Executive Clemency Board on March 28, 1977, asking that he be given another attorney or stating to any judicial body that he was dissatisfied with Mr. Dean's representation (R 176). The first time petitioner filed an official pleading before a judicial body raising the ineffective assistance of counsel issue was in the post-conviction 3.850 motion filed before Judge Gable (R 177). Petitioner then admitted

that he waited approximately four years since 1975 to actually file a pleading raising the ineffective assistance of counsel issue (R 178).

Petitioner admitted that on the night he was arrested he had the victim's watch and credit cards in his possession. He had a shotgun in his trunk and he had a tire iron in his trunk. He admitted giving an oral and written statement to Sgt. Felton admitting the killing of Mr. Schmidt. Petitioner admitted taking Sgt. Felton and Detective Lawrence to his hotel room where he showed them the proceeds from the robbery, items taken from Howard Johnson's (R 181, 182). Petitioner admitted that it added up to a pretty strong case (R 182). Petitioner indicated that he understood the meaning of an alibi defense (R 184) and that such defense necessarily meant that he didn't commit the crime. He stated that he told Mr. Windsor that he did not commit the crime (R 185). Petitioner admitted that he gave the statement to Officers Felton and Lawrence (R 186). He again repeated that he told Mr. Windsor that he was innocent and that somebody else committed the murder (R 187). Petitioner denied that he ever told anybody the reason Mr. Windsor got out of the case was because he had admitted to Windsor that he had committed the crime and that Windsor did not want to put him on the stand to suborn perjury. Petitioner stated that one reason he wanted to take a polygraph was to prove the truth of his alibi defense (R 190). There was no coercion on petitioner to take a polygraph test and the state attorney's office had nothing to do with his going to see Warren Holmes (R 191). Petitioner admitted that he was administered a polygraph examination by Warren Holmes (R 193). Petitioner admitted that after having the polygraph administered he had a conversation with Warren Holmes (R 200). Petitioner denied that he admitted to Mr. Holmes that he committed the murder; denied that he admitted to Mr. Holmes that

he had told his previous attorney, Mr. Windsor, that he wanted to take the stand and lie (R 200). Petitioner denied having made any admissions of guilt whatsoever to Mr. Holmes (R 201, 202). Petitioner again stated that he never lied to Mr. Windsor and only lied to Mr. Dean prior to the parole hearing (R 205, 206). Petitioner, when asked if he changed his story about what happened on the night of the murder would that come within his definition of lying, stated that it would (R 206, 207). Petitioner again stated that he never changed his story to Mr. Windsor about what happened on the night Schmidt was killed (R 207). His attention was then drawn to Plaintiff's Exhibit 4 which he identified as a letter he had sent to Ray Windsor on September 24, 1973 wherein the following was stated:

> Q (By Mr. Adorno) "Chris had for his share the credit cards, some of the traveler's checks, not all, most of the change and the rest of the small bills. The money taken out of my coat pocket was mine, not from the robbery. Believe me, I would not have the stomach to kill a person in cold blood and leave the body in a place to be found and on top of that use those -" and, then, you used a money sign on the typewriter, I guess to indicate a word you didn't want to put in print, "credit cards. Can't you see that? I know it will be hard to believe anything I said because of the number of times I have changed my story, but this is it, the truth."
>
> Did you write that to Mr. Windsor?
>
> A If it's in there, I did.
>
> (R 208)

Petitioner was then confronted with p. 2 of Defendant's Exhibit 5 for Identification (R 213, lines 8-19) and then asked what games he played with Mr. Windsor. Petitioner answered that he had reference to something he had explained before regarding Reid McLaughlin (R 213). As to matters he had fibbed about (R 216), petitioner stated this had to do with discrepancies between McLaughlin's participation. When asked why he fibbed about Reid McLaughlin, petitioner answered he was probably just confused (R 217). Petitioner testified

that he had admitted to Mr. Dean after the trial that he had committed the murder (R 218).

Peter Tighe was called as a witness on behalf of petitioner (R 403). Mr. Tighe during the month of April 1973 was a manager at Keith's Cruise Lounge in Hallandale, Florida, and he knew the petitioner, Robert Austin Sullivan (R 403). He stated that he also knew a person by the name of Thomas Murphy (R 404). Mr. Tighe was familiar with the date of April 8, 1973 because it was Billy Harlow's 18th birthday (R 408). Mr. Tighe recalled seeing Mr. Sullivan on April 8, 1973. He stated that petitioner was in the bar around 11:30 p.m. on the date in question (R 409). Tighe admitted that he couldn't tell exactly where petitioner was throughout the night but again stated he was there at 11:30 before the show went on and then afterwards at approximately 2:00 o'clock he (petitioner) sat down and talked to Michael Carmack, another bartender (R 410, 411). On cross-examination, Tighe stated he was almost positive that petitioner was in the bar when he walked in at 7:00 p.m. (E 417, 418). Later, his testimony changed as to the time petitioner came in the bar (R 421). Tighe admitted that all he could really say was that petitioner came into the bar and then left before Carmack came on duty at 10:00 o'clock and that this could have happened at anytime between 7:00 and 10:00 p.m. (R 423). Tighe in answer to the question, why didn't he come forward when he knew petitioner had been sentenced to prison, "I can't tell you why." (R 430, 431) He said he had his own problems and was waiting to contact him (R 431, 432). Tighe admitted that he couldn't see who left the bar between 12:30 and 2:00 a.m. on the morning of April 9, 1973 (R 449). On June 20, 1979, Tighe executed an affidavit and stated that the contents thereof was accurate and represented his total recollection of what happened at that time (R 467, 468).

In Paragraph 5 of the affidavit Tighe alleged that he was presently unable to recall with certainty the hours that Bob Sullivan was present in the lounge on that night (R 468, lines 5-12). The affidavit mentioned nothing about April 8th being Billy Harlow's birthday (R 469). Tighe testified that in 1973 he knew it was impossible for petitioner to have committed the murder but that he was simply too busy with his job and everything else to do anything about it (R 492). Tighe's testimony as to the presence in the bar in the late evening of April 8th and early morning hours of April 9, 1973 was equivocal. Note the following:

> Q Your're telling us that from your own independent recollection, you specifically remember Bob Sullivan at the lounge the night, late evening of April 8th, and the early morning hours of April 9th, 1973?
>
> A Yes.
>
> Q That's of your own independent knowledge?
>
> A Yes.
>
> Q No doubt about it in your mind?
>
> A No, no.
>
> Q You don't really need anything to corroborate your memory on that; you're pretty sure about that?
>
> A Yes. I'd say 99 percent.
>
> Q That he was there?
>
> A Yeah.
>
> (R 498, 499)

Following the above series of questions and answers, Tighe changed his testimony to being 100 percent sure as to petitioner being present in the bar on the dates in question. Note the following:

> Q Oh, there is a chance he was not there at all?
>
> A No. What I'm saying, you know, 99 percent means - that's like 100 percent.
>
> Q No, 99 means 99. 100 means 100.
>
> A I'll go with a hundred percent.
>
> Q I don't want you to go with anything. Do you have an independent recollection?

A Yes.

Q Without anything else helping you?

A Without anyone else helping me, yes.

Q You don't know anything else?

A No.

(R 499)

William Paul Harlow was called as a witness on behalf of petitioner (R 533). Mr. Harlow stated that he remembered being at Keith's Cruise Lounge on April 8, 1973 because he was celebrating his 18th birthday (R 534). Mr. Harlow testified that he and his party arrived at the bar at approximately 11:30 - 12:00 p.m. on April 8th and that he saw petitioner come in the bar before the show started (R 535). On cross-examination, Harlow stated that petitioner was not in the bar when he came in (R 542). Harlow stated that he talked to petitioner approximately five minutes at most (R 544) and after this he went back to his friends (R 545). Harlow then stated that thereafter he couldn't say exactly where petitioner went (R 545). Harlow stated that next time he specifically remembered seeing petitioner was sometime during the show when petitioner was standing by the bar talking to Michael (R 546). The next time Harlow remembered seeing petitioner was sometime after the show ended (R 548). Mr. Harlow also testified that he did know a Thomas Murphy (R 554) but at no time during the evening in question did he see Murphy with petitioner (R 555). Harlow testified that the first time he found out about Mr. Sullivan was when a person named Barry Weaver got in touch with him (R 557). He received some documents and newspaper articles from Mr. Weaver and was requested to get in touch with petitioner's lawyer, Mr. Roy Black (R 557, 558). The documents that Harlow received included petitioner's alibi, i.e., he was at the lounge on the evening in question (R 560).

Mr. Harlow stated that he had been requested to write down his recollection of the events on the night of April 8, 1973 and he did so (R 561). This was typed up and marked as Defense Exhibit 44 for Identification (R 562).

Raymond Martin Windsor was called as a witness by the respondents (R 582). Mr. Windsor stated that he was an attorney admitted to practice in the State of Florida and before the U.S. District Court of the Southern District of Florida. He then outlined his professional background stating that 50 to 60 percent of his practice was in the field of criminal law. He had served as an assistant public defender (R 583). Mr. Windsor first met petitioner in April of 1973 after having been appointed by Judge Cowart to represent him (R 585). In the course of events, Windsor learned about the state's case against petitioner and that the crime with which he was charged was a very heinous one and that there had been an admission by petitioner as to his complicity (R 586, 587). When asked if he had received any other information regarding petitioner's guilt, Windsor answered in the affirmative, explaining that petitioner had admitted to him his participation in the crime (R 587). Windsor could not recall the exact dialogue when petitioner expressed his participation but emphasized that petitioner did acknowledge his guilt although he could not recall the exact words (R 588). Windsor explored the possibility of several defenses and requested a psychiatric report. He did receive a report, State's Exhibits 25 and 28 from Dr. Corwin and Psychologist Norman Reichenberg (R 589). Windsor stated that Dr. Corwin's report corroborated petitioner's admitted responsibility in the matter (R 590). The defense of alibi was explored and this was a defense that petitioner wanted Windsor to utilize by manufacturing for him an alibi defense. Petitioner wanted Windsor to go out and locate alibi witnesses, put them on the stand, and have them perjure

themselves (R 590, line 23--R 59, line 5). Windsor took many depositions in preparation for trial and was aware of the allegation that he had not been present at the taking of certain depositions (R 591). He stated that those depositions were taken by the codefendant's attorney, Steven Bronis (R 591, 592). Windsor had an agreement with Bronis regarding the taking of those depositions and this involved an aspect of Windsor's trial strategy. Note the following:

> A Yes. It was my intent to have Mr. Bronis take the depositions of those witnesses, have them typed up, thereby giving me the opportunity to read those depositions; then, have a second bite at the apple, so to speak. I didn't think I would have any problem retaking depositions of witnesses whose statements I would want to thoroughly to into, or more thoroughly to into or more greatly clarify.
>
> I wanted to have an opportunity to have them down on the record as many times as I possibly could, in order to obtain as many inconsistencies as possibly could be obtained.
>
> (R 592)

There came a time when Windsor wanted to withdraw as counsel of record for petitioner (R 593). He identified Defendant's Exhibit 23 as a transcript of the hearing on the motion to be relieved of responsibility for handling petitioner's case. When asked what he did not tell the court as to his reason for wanting to withdraw, Windsor responded as follows:

> A Essentially, Mr. Sullivan wanted me to pursue an alibi defense for him. Apparently he would have wanted to call certain witnesses who he would be contending would be able to place him at a scene different from the place of the alleged homicide at the time and it was absurd, because prior to that time Sullivan had communicated to me his participation in this matter and now he wanted me to establish or manufacture an alibi defense for him.
>
> I didn't go to the Court and say Judge, Mr. Sullivan wants me to suborn perjury, and Mr. Sullivan wants to get on the stand and perjure himself. I didn't feel it was incumbent upon me to be an accuser. I was still his lawyer. I felt it was still necessary for me, until I was - while I was still in this case to protect him as best I can and not prejudice his right before this, the same or any other judge.

So, I deliberately told the Court, being rather vague, merely advising the Court that he wanted me to utilize a particular defense, but I felt it wasn't in his best interest and as a result of that, we had a communication breakdown.

(R 593, 594)

Windsor next identified the handwriting on Defendant's Exhibit 26 as being that of petitioner and his initials, RMW, appearing in the upper left hand corner (R 594, 595). Windsor recalled that the name of Thomas Murphy came up and that an effort was made to locate him (R 595). However, this was unsuccessful and Windsor stated that the man had not been located to this day (R 596). Windsor was aware that he had been charged with taking the burden on the motion to suppress and stated in retrospect this was a technical error (R 596). He explained that although it was not incumbent on him to accept that burden (R 596) he did not think it had any practical effect on the outcome of the motion (R 597). Windsor explained that Judge Cowart, considering the gravity of the offense, gave himself and Mr. Bronis all the latitude in the world to ask any questions that were believed to be relevant (R 597). At the time of the hearing on the motion to suppress, Windsor had read the depositions of the lead investigators (R 597) and was aware of what their testimony would be (R 598). Note the following:

Q In your opinion, did your assuming the burden of going foward on the motion to suppress have any bearing on the ultimate result?

A None whatsoever.

Q In your opinion, was there any prejudice to your case by going forward?

A None.

Q Have you ever in the ten years that you have been practicing law been accused of giving ineffective assistance of counsel before?

A No. This is the first time.

(R 598)

Warren Holmes, polygraph examiner, was called as a witness by the respondents (R 515). Mr. Holmes first stated his experience in the area of polygraph examination and said that he averaged about 1,200 cases per year. He had been employed as a polygraph examiner for approximately 26 years (R 515). He stated that on October 31, 1973 petitioner was submitted to him for polygraph examination by his attorney, Dennis Dean. He took some background information to learn petitioner's version of what it was he was supposed to be tested on (R 517). The essence of what the polygraph examination was to be on was whether petitioner had been involved in the murder of Donald Schmidt. Petitioner told Holmes that he didn't commit the crime and stated he had an alibi for the particular time. Some test questions were phrased and a polygraph examination was then administered to petitioner. At the conclusion of the polygraph examination, Holmes had a conversation with petitioner which was memorialized in the report submitted to petitioner's attorney (R 518, 519). Holmes identified Defendant's Exhibit 12 for Identification as being a true and accurate copy of the report submitted to Mr. Dean (R 519). After the examination was concluded, Holmes had a conversation with petitioner and advised him that on the basis of the polygraph charts that petitioner wasn't telling the truth. He went over the graphs with petitioner question by question and showed him the physiological reaction that was indicative of deception. Petitioner then told Holmes that he had tried to plead guilty but that the state wouldn't accept his plea. Petitioner further remarked to this witness as follows:

> He told me that he had told the Assistant Public Defender that he was guilty and that he wanted to take the stand and to lie about it, but that the Assistant Public Defender didn't want him to do that, so, he made arrangements to get another attorney, which was Mr. Dean.
>
> He said he didn't want to confess to Mr. Dean, because it would put him in a compromising position.

> Then, he admitted to me that he did, in fact, kill Donald Schmidt; that he had taken him out of the Howard Johnson's Restaurant to a place where he was found; that he hit him with a tire iron and that he shot him with this gun he called Betsy.
>
> Then, I asked him why he did it and he said that for two reasons, that he had a fascination about the act of murder and that he wanted to see if he could live up to the test of killing somebody.
>
> Then, he said the other factor was that a revenge against Howard Johnson's for having him prosecuted in a theft there.
>
> That, in essence, is what he told me.
>
> (R 520, 521)

Mr. Holmes stated that this was the first time in 26 years that he had ever testified on a confidential report (R 522). On redirect examination, Holmes stated as to the one encompassing question, were you in Keith's Cruise Lounge at the time Donald Schmidt was shot, (R 530, 531) he went over petitioner's response to this particular question and explained that in his opinion there was a deceptive reaction. It was at this time that petitioner began to tell a different story (R 531).

When asked if he had an independent recollection of this particular polygraph examination, although it was seven years ago, Holmes responded:

> A Yeah, because it was two things that he told me in that confession that I had not heard before or not as a routine. One, when he told me that this young Assistant State-Attorney didn't want him to take the stand and lie --
>
> Q You mean Public Defender?
>
> A Public Defender, which I thought was a noble gesture on the part of the Public Defender and the other was the fact that most of the murder confessions that I have taken are done on impulse or out of fear or hatred. It's unusual for someone to tell me that he had a fascination for the act of murder and also whether or not he could measure up to the test of killing a human being.
>
> I've taken hundreds and hundreds of murder confessions and nobody has ever told me that they committed a murder to see whether they could measure up to the test of killing a human being.

I didn't need any notes to remember that statement on his part.

(R 532, 533)

Robert Sullivan, petitioner, was called as a witness by the respondents (R 614). When questioned as to Defendant's Exhibit 26 for Identification, petitioner through his counsel invoked the Fifth Amendment, and it was stipulated that as to any questions regarding this particular exhibit that petitioner through his attorney would invoke the Fifth Amendment (R 615, 616). Counsel for respondents desired to explore several areas, particularly two, with respect to this particular exhibit. The areas that respondents desired to question petitioner on as to this exhibit were as follows:

> Number one would have been the veracity of what I believe has already been identified as Mr. Sullivan's handwriting, given to Mr. Windsor, of Defendants' Exhibit 26 for Identification, with respect to the truth of the actual commission of the murder of Donald Schmidt, which the Plaintiff admits in this particular exhibit and also with respect to the setting up of an alibi defense by the returning to Keith's Cruise Lounge after the murder was committed between 2:30 and 3:00 o'clock A.M., in their attempts to make it look like they had been there earlier.
>
> Those are the two main areas, although there were other areas I would have examined as to relevant issues that have been raised, both in the Plaintiff's case and also during our brief portions of our case.

(R 616, 617)

Petitioner expressed his opinion that Mr. Black was the first lawyer that had effectively represented him (R 619). He stated that he was aware of the issues involved in the Rule 3.850 filed in state court and in the instant habeas petition filed in federal court and had had an opportunity to fully discuss those issues with Mr. Black (R 620). Petitioner couldn't think of anything else that had not been covered or raised in those petitions relative to the issue of his receiving a fair trial and fair representation (R 621). When asked if it was his opinion that Warren Holmes

lied under oath, petitioner's counsel objected and invoked the Fifth Amendment (R 622). Respondents objected to petitioner's being allowed to take the Fifth Amendment on this issue (R 624). After some discussion, this court permitted petitioner to follow his counsel's advice and decline to answer on the basis of Fifth Amendment rights. Petitioner stated that he remembered Ray Windsor saying that he (petitioner) had told him that he admitted his participation in the killing of Donald Schmidt (R 629). Petitioner admitted that he had heard Mr. Windsor's testimony to the effect that petitioner had told him (Windsor) that he wanted to take the stand and proceed with a fabricated alibi defense (R 629, 630). Petitioner when asked if he denied admitting the crime to Mr. Windsor invoked his Fifth Amendment privilege. Counsel responded that on original cross petitioner had specifically denied ever making such a statement to Ray Windsor (R 630). The court permitted petitioner to again invoke his Fifth Amendment privilege (R 631, 632). Petitioner was subsequently permitted to invoke the Fifth Amendment privilege as a bar to answering pertinent questions propounded by counsel for respondents (R 632, 633). Petitioner stated that as best he could recall after taking the polygraph examination there was only one occurrence in which Mr. Dean mentioned it. This was just that he had received it, not what was in the report (R 644, 645). The only other thing petitioner recalled was that he wrote Dean and told him to retain the polygraph report in his files. Petitioner then stated that through December 1974 he was unaware of what Mr. Holmes was saying had transpired at the polygraph examination (R 645). Respondents at this time moved into evidence Defendant's Exhibit 3 which was a letter that petitioner had invoked the Fifth Amendment when asked to identify his handwriting. The exhibit was admitted in evidence (R 645, 646). When

questioned about admissions made in this letter, respondents' Exhibit 3 (R 646), petitioner again invoked his Fifth Amendment rights (R 647). The paragraph read from respondents' Exhibit 3 to which petitioner invoked his Fifth Amendment privilege was as follows:

> Q (By Mr. Adorno) Reading from the last paragraph on Page 1, "Fourth and possibly the most important, is there any way I could have another court-ordered psychiatric examination? There is one prime reason of this request at this late date. Obviously, my position is more extreme than before trial and this has, in part, been a prime motivating force. I will brief you on this because you have already seen on that polygraph report that I do admit the crime, which is obvious from close examination anyway."
>
> (R 646, 647)

As to all remaining questions relating to this exhibit, petitioner invoked his Fifth Amendment privilege (R 648). When asked if he committed the murder, petitioner answered in the negative (R 651). Petitioner then admitted having been examined by Dr. Corwin prior to trial. But when asked if he admitted to Dr. Corwin his participation in committing the murder, objection was made by his counsel (R 651). The objection was sustained (R 655). Petitioner again indicated he would invoke the Fifth Amendment privilege with respect to identifying a group of letters. Counsel for respondents indicated that questions would be propounded to petitioner concerning Defendant's Exhibits 2, 7, 27, 4, 5, 10, and 8. Counsel for petitioner indicated that the privilege was asserted (R 656). As to the relevancy of the letters that had been offered in evidence, counsel for respondents remarked as follows:

> MR. ADORNO: Judge, the problem here, he's put that in issue quite clearly by saying I didn't do it, you didn't investigate an alibi defense and he denies Holmes and his comments to Windsor.

> How is the Court going to weigh whether Windsor is telling the truth or whether Holmes is telling the truth or whether Mr. Sullivan is telling the truth, unless either through cross examination or direct examination something is brought to light that shows that he is inconsistent, that is, he being the Plaintiff.
>
> These letters are not being introduced to show whether he did or did not commit the crime, but only to show that Mr. Windsor and Mr. Holmes' testimony is corroborated, that he did make those statements.
>
> I didn't tell him to put it in issue. I didn't tell him to stand up here and say I deny committing the crime.
>
> He is absolutely right, he is entitled to a habeas and he is entitled to a 3.850 and ineffective assistance of counsel, but when he puts at issue that he did not commit the crime and that certain individuals didn't do their job and one of them, for example, was the alibi defense, I think the whole issue as to whether he did or did not commit the crime is now in issue and any admissions he makes comes in for that purpose to impeach him and it corroborates the State's witnesses.
>
> (R 664, 665)

The remainder of petitioner's testimony was a continual invocation of the Fifth Amendment privilege as to questions propounded by respondents' counsel (R 672-678; 682-687; 689-706).. When asked by the court if he was satisfied with what had been done at the hearing on his behalf by his attorney, petitioner answered, "I am, Your Honor." (R 708) Petitioner was excused and counsel for respondents then offered in evidence Defendant's Exhibits 43 and 44 which were the affidavits of Mr. Tighe and Mr. Harlow (R 709). Counsel for petitioner had no objection and same were admitted in evidence as Respondents' Exhibits 43 and 44 (R 710). Defendant's Exhibit 28, the psychological evaluation of petitioner by Norman Reichenberg, was introduced in evidence (R 710). Dr. Corwin's report,. defense Exhibit 25 for Identification was introduced in evidence over objection of petitioner's counsel (R 711). Other documents were admitted in evidence and the court then set a date for filing the transcript of this hearing and establishing a briefing schedule (R 717).

The foregoing resume of testimony taken at the hearing before this court on March 6, 7, and 10, 1980 is for the purpose of aiding this court in its review of the testimony presented and deciding upon the ultimate facts upon which it will rely. Hopefully it will be of some aid to this court in finally disposing of this cause on the merits.

According to this court's order dated February 12, 1980, the issues on which testimony was to be presented are stated as follows:

I.

WHETHER PETITIONER WAS DENIED DUE PROCESS BECAUSE OF THE STATE COURT TRIAL JUDGE'S DECISION NOT TO PERMIT HIM TO BE PRESENT AT THE EVIDENTIARY HEARING ON HIS MOTION TO VACATE FILED PURSUANT TO Fla.R.Cr.P. 3.850.

II.

WHETHER THE REPRESENTATION OF COURT-APPOINTED ATTORNEY RAYMOND WINDSOR CONSTITUTED INEFFECTIVE ASSISTANCE OF COUNSEL.

III.

WHETHER THE REPRESENTATION AFFORDED PETITIONER BY COURT-APPOINTED ATTORNEY DENNIS DEAN CONSTITUTED INEFFECTIVE ASSISTANCE OF COUNSEL.

ARGUMENT

I.

WHETHER PETITIONER WAS DENIED DUE PROCESS BECAUSE OF THE STATE COURT TRIAL JUDGE'S DECISION NOT TO PERMIT HIM TO BE PRESENT AT THE EVIDENTIARY HEARING ON HIS MOTION TO VACATE FILED PURSUANT TO Fla.R.Cr.P. 3.850.

In the initial petition for writ of habeas corpus filed June 25, 1979 in Paragraph 12 thereof, petitioner set forth in detail the grounds upon which his claim of illegality of conviction and death sentence were premised. Respondents filed an Answer to the petition and discussed seriatim all issues raised under Paragraph 12 of the

petition. Respondents at this time reaver each and every those arguments made in the answer just as though the same were set forth herein in haec verba.

Petitioner subsequently filed an Amended Petition for Writ of Habeas Corpus and respondents filed a Supplemental Response (Answer) to Petition and Amended Petition for Writ of Habeas Corpus. In this supplemental response the issue of the necessity for petitioner's presence at the state court evidentiary hearing was discussed. Please see pp. I-3 of the supplemental response which by reference is incorporated herein just as though the same were set forth herein in haec verba.

There can be little question in anybody's mind but that petitioner received a full and fair hearing before this court. That being so, it appears that the question of whether the state court trial judge erred in refusing to have petitioner returned for the state court hearing on the 3.850 motion is moot. Therefore, unless further instructed by this court so to do, respondents will rely upon the arguments above-referenced in support of their position that the state court trial judge did not err.

II.

WHETHER THE REPRESENTATION OF COURT-APPOINTED ATTORNEY RAYMOND WINDSOR CONSTITUTED INEFFECTIVE ASSISTANCE OF COUNSEL.

III.

WHETHER THE REPRESENTATION AFFORDED PETITIONER BY COURT-APPOINTED ATTORNEY DENNIS DEAN CONSTITUTED INEFFECTIVE ASSISTANCE OF COUNSEL.

The testimony of Ray Windsor previously discussed in this brief shows conclusively that he had an agreement for Steve Bronis, counsel for petitioner's codefendant, to take several of the depositions. The strategy involved in this was that after said depositions taken by Bronis had been transcribed Windsor could review them and decide

if he needed to retake any of the depositions that Bronis had taken. This, in effect, would give "two bites of the apple" in an effort to create as much inconsistency as possible. Windsor read all of the depositions and nothing was made to appear at the hearing before this court or anywhere else that prejudice resulted to petitioner because Windsor was not present at the taking of every deposition.

It is claimed also that Windsor rendered ineffective assistance of counsel because at the hearing on the motion to suppress he along with Steve Bronis assumed the burden of going forward with the evidence rather than having the state do so. Windsor testified that he was in no way hampered in the presentation of his testimony in petitioner's behalf because of having assumed this burden. Judge Cowart granted broad discretion to the attorneys as far as asking necessary questions. Windsor gave it as his considered opinion that the fact of his going forward with the evidence at the suppression hearing in no way influenced the final ruling by Judge Cowart. Respondents note with interest that while Judge Cowart was on the witness stand, petitioner at no time inquired of him as to whether Windsor's assuming the burden of going forward with the evidence at the suppression hearing influenced his decision to deny the motion to suppress.

In contemplating the services rendered by Dennis Dean in behalf of petitioner, one wonders what degree of expertise is necessary on the part of a defense counsel in order to withstand a charge of ineffective assistance. When this charge is viewed in the light of what Dennis Dean actually did in representing petitioner, it becomes the absurdity of all absurdities. Frankly, the charge is so ridiculous that to make an effort towards refuting same lends it an undeserved dignity.

It is believed that the main thrust of petitioner's assertions made in support of his claim of ineffective assistance of counsel has to do with the alleged failure of Dean to secure the attendance of so-called alibi witnesses. Other matters were raised in petitioner's effort to support his claim of ineffective assistance but all of them were thoroughly explained by Dean in his testimony at the hearing.

To begin with, it must be emphasized that a court-appointed attorney is not vulnerable to a charge of ineffective assistance because of not obtaining testimony of an alibi witness where such testimony could not be considered an alibi. Mays v. Estelle, 610 F.2d 296 (5th Cir. 1980). Something else that should not be forgotten is that there is a presumption that counsel rendered effective assistance and to overcome that presumption on collateral attack the petitioner must shoulder a heavy burden. Catches v. United States, 582 F.2d 453 (8th Cir. 1978); Bruce v. Estelle, 536 F.2d 1051 (5th Cir. 1976), cert. denied 492 U.S. 1053. When this presumption is viewed against the background of the testimony of Judge Cowart and Judge Gable as to Mr. Dean's reputation for excellence in the field of criminal law, then the presumption must, indeed, become a heavy burden. A reminder--there was no expert testimony whatsoever produced by petitioner to the effect that Dean's representation of petitioner either at the trial or appellate level constituted as a matter of law ineffective assistance of counsel. Thus, the testimony of Judge Cowart and Judge Gable stands uncontradicted, unchallenged, and unimpeached.

We think a discussion of applicable case law, state and federal, is in order.

In Beckham v. State, 339 So.2d 221 (Fla.App. 3 1976), the court remarked as follows:

> To successfully collaterally attack a judgment on the grounds of ineffective assistance of counsel, the facts alleged must demonstrate that the trial was a mockery or a farce. Simpson v. State, 164 So.2d 224 (Fla. 3d DCA 1964); Quesada v. State, 321 So.2d 442 (Fla. 3d DCA 1975).
>
> Further, mishandling of a trial with regards to matters falling within the judgment or strategy of counsel does not constitute ineffective assistance of counsel. Solloa v. State, 227 So.2d 217 (Fla. 3d DCA 1969).

Id. at 222. See also United States v. Childs, 571 F.2d 315 (5th Cir. 1978).

We think the remarks of the Second District in State v. Eby, 342 So.2d 1087 (Fla.App. 2 1977), are particularly appropriate:

> Secondly, a decision not to raise certain possible defenses or call certain defense witnesses is ordinarily a matter of personal judgment and strategy within the prerogatives of defense counsel. As such, it is not a proper predicate for a collateral attack on the competence of counsel unless it is so irresponsibly exercised as to constitute "inadequate" representation. Here, the undisputed testimony of trial counsel revealed a deliberative, well-founded decision to pursue the course taken which, on its face, is not unreasonable nor irresponsible. No evidence was before the trial court to support a contrary finding; and neither second-guessing nor substituting the court's own hindsight judgment for that of trial counsel will suffice to reject as "inadequate" the role of trial counsel.

Id. at 1089, 1090. Similarly, the remarks of the Third District in Wingert v. State, 353 So.2d 643 (Fla.App. 3 1977), are particularly appropriate. Note the following:

> Rather, it is apparent from the record that the decision not to move to suppress the recorded statement was made at the time because trial counsel felt that the exculpatory portions of the statement were strong enough to serve the purpose of getting defendant's explanation of the killing before the jury without putting the defendant on the stand. Such a decision is not the kind that would establish incompetency of counsel. See State v. Eby, 342 So.2d 1087 (Fla. 2d DCA 1977); and Odom v. U.S., 377 F.2d 853 (5th Cir. 1967).

Id. at 645.

The Fifth Circuit has held that the governing standard for appointed counsel is reasonably effective assistance. Herring v. Estelle, 491 F.2d 125 (5th Cir. 1974); Mac Kenna v. Ellis, 280 F.2d 592 (5th Cir. 1960). However, as later stated by that court, Akridge v. Hooper, 545 F.2d 457 (5th Cir. 1977), reasonable competency is based on the situation, the circumstances, and the law as understood at the time. Certainly, the effectiveness of counsel does not require an imaginative assertion of every possible theory of defense or mitigation which might in the unpredictable future turn out to be accepted by some court, some day, in some case. Davis v. Wainwright, 547 F.2d 261 (5th Cir. 1977). Simply stated, due process of law in this context simply means that an accused must have such assistance as will assure him of due process of law. Pineda v. Bailey, 340 F.2d 162 (5th Cir. 1965).

A defendant has the right to reasonably effective assistance of counsel but he does not by any stretch of the imagination have the right to errorless counsel. United States v. White, 524 F.2d 1249 (5th Cir. 1975). Cf. Tollett v. Henderson, 411 U.S. 258, 36 L.Ed.2d 235, 244, 93 S.Ct. 1602 (1973). In other words, the correct legal standard for such "range of competence" is that of "[N]ot errorless counsel and not counsel judged ineffective by hindsight, but counsel reasonably likely to render and rendering reasonably effective assistance." MacKenna v. Ellis, 280 F.2d 592, 599 (5th Cir. 1960). If this standard is followed, then the force of reason compels the conclusion obviously reached by the trial judge that petitioner did, indeed, receive effective assistance of counsel. See also Fitzgerald v. Estelle, 505 F.2d 1334 (5th Cir. 1975). It is submitted that in an area where intuitive judgments and spontaneous decisions are often

required, retrospective judgment of the artistry of the advocate is most difficult because the elements influencing judgment usually cannot be captured on the record. Thus, the representation afforded by any lawyer to his client is not readily capable of later audit like a bookkeeper's. For example, see Arnold v. Wainwright, 516 F.2d 964 (5th Cir. 1975). It is submitted that the adequacy of representation which petitioner received can only be decided on an evaluation of the services rendered in his behalf. However, a retrospective examination of a lawyer's representation for the purpose of determining whether same was free from error would surely exact a higher measure of competency than the prevailing standard. See McMann v. Richardson, 397 U.S. 759, 25 L.Ed.2d 763, 90 S.Ct. 1441 (1970).

In Fitzgerald v. Estelle, 505 F.2d 334 (5thCir. 1974), the court opined that the test in assessing the effectiveness of counsel is whether said counsel was likely to and did render reasonably effective assistance to a defendant. In Wainwright v. Sykes, 433 U.S. 72 (1977), the United States Supreme Court proclaimed that it was clear that trial counsel need not consult with his client on matters at trial:

> In Henry v. Mississippi, 379 U.S., at — 451, the Court noted that decisions of counsel relating to trial strategy, even when made without the consultation of the defendant, would bar direct federal review of claims thereby foregone, except where "the circumstances are exceptional." Footnote 14, p. 91.
>
> Chief Justice Berger, concurring, held:
>
> Once counsel is appointed, the day-to-day conduct of the defense rests with the attorney. He, not the client, has the immediate--and ultimate--responsibility of deciding if and when to object, which witnesses, if any, to call, and what defenses to develop. Not only do these decisions rest with the attorney, but such decisions must, as a practical matter, be made without consulting the client. The trial process simply does not permit the type of frequent and protracted interruptions which would be necessary if it were required that clients give knowing and intelligent approval to each of the myriad tactical decisions as

Id. at 93.

In Herring v. Estelle, 491 F.2d 125 (5th Cir. 1974), the Fifth Circuit enunciated the constitutionally required minimum standard for assistance of counsel, stating:

> The governing standard is reasonable effective assistance. One method of determining whether counsel has rendered reasonable effective assistance is to ask whether the proceedings were a farce or mockery. The farce-mockery test is but one criterion for determining if an accused has received the constitutionally required minimum representation.

Id. at 128. Further, in Herring v. Estelle, supra, at 218, the court went on to say that it was defense counsel's job to provide the accused with an understanding of the law in relation to the facts. The advice defense counsel gives need not be perfect, but it must be reasonably competent. Effective assistance of counsel has been interpreted not to mean errorless counsel and not counsel judged ineffective by hindsight, but counsel reasonably likely to render and rendering reasonably effective assistance. United States v. Gray, 565 F.2d 881 (5th Cir. 1978), cert. denied, 435 U.S. 955; United States v. White, 524 F.2d 1249 (5th Cir. 1975); MacKenna v. Ellis, 280 F.2d 592 (5th Cir. 1960), cert. denied, 368 U.S. 877, 82 S.Ct. 121, 7 L.Ed.2d 78 (1960). In White, supra, the petitioner complained that his attorney should have objected to the seating of some of the jurors, and further stated that counsel failed to object to the introduction of suppressed evidence. White also contended that his counsel ineffectively presented his insanity defense. The court in this case affirmed petitioner's conviction, stating that "the best lawyers have to take the facts as they are and can only do their best to present those facts in any available favorable light." United States v. White, supra, at 1253. Counsel put on petitioner's alibi defense. Gomez v. Beto, 462 F.2d 596 (5th Cir. 1972); Pennington v. Beto, 437 F.2d 1281 (5th Cir. 1971). A review of the state court trial transcript, the transcript of evi-

of the habeas hearing held in this court in March 1980 demonstrates that petitioner's claim of ineffective assistance is without merit. Again, we emphasize that petitioner's burden to establish his claim of ineffective assistance is heavy. Neither hindsight nor success is the measure for determining adequacy of legal representation. United States ex rel. Reis v. Wainwright, 525 F.2d 1269 (5th Cir. 1976); Ellis v. State of Oklahoma, 430 F.2d 1352 (10th Cir. 1970), cert. denied, 401 U.S. 1010 (1971). To reiterate, petitioner charges Windsor with ineffective assistance of counsel, not because necessary depositions of prospective witnesses were not taken, but because Windsor wasn't present when all of the depositions were taken. We point out that there is no constitutional right to pretrial discovery depositions in a criminal case. United States v. Adock, 558 F.2d 397 (8th Cir. 1977), cert. denied, 434 U.S. 921; United States v. Nichols, 534 F.2d 202 (9th Cir. 1976). In any event, this, as previously explained, was a matter of trial strategy on Mr. Windsor's part. To say that this constitutes ineffective assistance of counsel is speculative at best and speculative claims are not enough to support such a charge. Packnett v. United States, 435 F.2d 693 (5th Cir. 1970); Haggard v. State of Alabama, 550 F.2d 1019 (5th Cir. 1977).

In the recent case of United States v. Gray, 565 F.2d 881 (5th Cir. 1978), cert. denied, 435 U.S. 955, the court remarked as follows:

> We begin with the settled principle that the right to counsel of one's choice is not absolute as in the Sixth Amendment right to the assistance of counsel. United States v. Sexton, 5 Cir. 1973, 473 F.2d 512; United States v. Harrelson, 5 Cir. 1973, 477 F.2d 383, cert. denied, 414 U.S. 847, 94 S.Ct. 133, 38 L.Ed.2d 95. Second, time spent in preparation is only one of many factors to be considered in determining such claims. Herring v. Estelle, 5 Cir. 1974, 491 F.2d 125, 127; Doughty v. Beto, 5 Cir. 1968, 396 F.2d 128, 130; Loftis v. Estelle, 5 Cir., 1975, 515 F.2d 872, 875; Summers v. United States, 5 Cir., 1976, 538 F.2d 1208, 1210 n. 3; Jones v.

> Henderson, 5th Cir., 1977, 549 F.2d 995, 997. The appropriate test to be applied is whether counsel was reasonably likely to render and did render reasonably effective counsel. E.G., Herring v. Estelle, supra; Hudson v. State of Alabama, 5 Cir., 1974, 493 F.2d 171, 173.
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> A review of the Fifth Circuit law indicates that this Court's methodology involves an inquiry into the actual performance of counsel in conducting the defense and a determination whether reasonably effective assistance was rendered based on the totality of the circumstances and the entire record. This Circuit does not blindly accept speculative and inconcrete claims of "what might have been if." If an appellant can point to specific examples of ineffectiveness, we have not hesitated to grant a new trial or hearing. See, as examples of this methodology, United States v. Edwards, 5 Cir., 1974, 488 F.2d 1154, 1163; Doughty v. Beto, supra; United States v. Fruge, 5 Cir., 1974, 495 F.2d 557; Hora v. State of Louisiana, 5 Cir. 1974, 495 F.2d 1248; Lee v. Hopper, 5 Cir., 1974, 499 F.2d 456, 462-65, cert. denied, 419 U.S. 1053, 95 S.Ct. 633, 42 L.Ed.2d 650; Fitzgerald v. Estelle, 5 Cir. 1975, 505 F.2d 1975, 505 F.2d 1334, 1338-42 (en banc), cert. denied, 422 U.S. 1011, 95 S.Ct. 2636, 45 L.Ed.2d 675; Loftis v. Estelle, 5 Cir., 1975, 515 F.2d 872, 875-76; Howard v. Henderson, 5 Cir., 1975, 519 F.2d 1176, 1178, cert. denied, 423 U.S. 1036, 96 S.Ct. 573, 46 L.Ed.2d 412; Jerkins v. United States, 5 Cir., 1976, 530 F.2d 1203, 1204 n. 1; Mason v. Balcom, 5 Cir., 1976, 531 F.2d 717, 723-25; United States v. Fessel, 5 Cir., 1976, 531 F.2d 1275, 1278-79; Trahan v. Estelle, 5 Cir., 1977, 544 F.2d 1305, 1316-20 (Goldberg, J., specially concurring); Haggard v. State of Alabama, 5 Cir. 1977, 550 F.2d 1019, 1022-23.

Id. at 887. It should be noted that the Fifth Circuit's totality of circumstances test, as explicated in United States v. Gray, supra, does not mean that a single error can render counsel's assistance ineffective. We think the case of Webster v. Estelle, 505 F.2d 926 (5th Cir. 1975), well expressed the Fifth Circuit's opinion on the issue of ineffective assistance of counsel. Note the following:

> The fundamental rules by which petitioner's claim must be judged are well settled. The burden of proof is on the petitioner in a habeas corpus proceeding. A judgment of conviction must be presumed to have been reached in accordance with due process unless otherwise shown. "If the result of the adjudicatory process is not to be set at naught, it is not asking too much

> that the burden of showing essential unfairness be sustained by him who claims such injustice and seeks to have the result set aside and that it be sustained not as a matter of speculation but as a demonstrated reality." Adams v. United States, 317 U.S. 269, 281, 63 S.Ct. 236 (1942). [cites omitted]

Id. at 928.

Petitioner alleges that his court-appointed counsel, Dennis Dean, failed to request a continuance of the trial date and thus deprived himself of adequate time in which to prepare. Mr. Dean denied this emphatically in his testimony. However, the Fifth Circuit's position on this issue is clear: shortness of preparation time alone is not enough to establish a claim of ineffective assistance of counsel. The petitioner must show more than counsel's brief preparation period. Herring v. Estelle, 491 F.2d 125, 128 (5th Cir. 1974). In other words, the petitioner must show that as a result of such brief preparation that his counsel committed other specific errors which rendered him ineffective. In the instant case, petitioner has woefully failed to carry this burden.

The Fifth Circuit has excused a wide variety of failures and omissions on the basis that such actions or inaction amounted to well-considered trial tactics. See Williams v. Beto, 354 F.2d 698 (5th Cir. 1965); Winters v. Cook, 489 F.2d 174 (5th Cir. 1973); United States ex rel. Reis v. Wainwright, supra; United States v. Garza, 563 F.2d 1164 (5th Cir. 1977). Two opinions which have addressed the attorney-client relationship in depth are Williams v. Beto, supra, and the special concurrence in Wright v. Estelle, 572 F.2d 1071 (5th Cir. 1978). Both conclude that the trial tactics and strategy are particularly within the province of the attorney and that a petitioner would have to show more than mere mistakes or faulty judgment. In Wright v. Estelle, supra, the Fifth Circuit commented as follows:

> If he decides to accept an attorney, the defendant has necessarily delegated important decisionmaking authority to his attorney. The scope of the delegation does not turn on the importance of the decision--the attorney frequently makes judgments affecting the very life of the defendant. The question here is twofold: who is in a better position to judge trial strategy and who is in a better position to ensure the best interests of the defendant. This court's history is filled with the recognition of the value of an attorney. No one could seriously contend that a defendant is in a better position to dictate trial strategy than his attorney.

Id. at 1071.

Again, respondents emphasize that counsel's efforts need not be perfect, just reasonably competent. Herring v. Estelle, 491 F.2d 125 (5th Cir. 1974). Also, counsel's performance "is not judged by a retrospective consideration as to whether the advice of counsel was or was not the best that could have been given." Ballard v. Blackburn, 583 F.2d 159, 163 (5th Cir. 1978). See also Williams v. Beto, 354 F.2d 698 (5th Cir. 1965), where the court stated, "it is basically unreasonable to judge an attorney by what another would have done, or says he would have done, in the better light of hindsight." Id. at 706.

In summary, petitioner sub judice has failed to show that either of his court-appointed counsel, Ray Windsor or Dennis Dean, was ineffective. He has failed to show that he was prejudiced in any way by either counsel's conduct. Davis v. State of Alabama, 596 F.2d 1214 (5th Cir. 1979).

Respondents reaver each and every the matters and things in their Motion to Strike Complaint of Ineffective Assistance of Counsel and Memorandum of Law in support thereof just as though the same were set forth herein in

CONCLUSION

The petition for writ of habeas corpus should be denied.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I have furnished a copy of the foregoing Memorandum Brief to Roy E. Black, P.A., 150 S.E. 2nd Avenue, Ste. 1402, Miami, Florida 33131, by mail, this 5th day of May 1980.

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